TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 155

CLARENCE EARL GIDEON, PETITIONER,

vs.

H. G. COCHRAN, JR., DIRECTOR, DIVISION OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

PETITION FOR CERTIORARI FILED JANUARY 8, 1962

CERTIORARI GRANTED JUNE 4, 1962

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE CIRCUIT COURT OF BAY COUNTY, STATE OF FLORIDA

STATE OF FLORIDA

vs.

CLARENCE EARL GIDEON

INFORMATION CHARGING BREAKING AND ENTERING WITH INTENT TO COMMIT A MISDEMEANOR—Filed June 19, 1961

J. Frank Adams, as State Attorney for the 14th Judicial Circuit of the State of Florida, prosecuting for said State in the County of Bay, under oath informs the Court that Clarence Earl Gideon, on the 3rd day of June, A. D. 1961, in the State and County aforesaid, did unlawfully and feloniously break and enter a building of another, to-wit, The Bay Harbor Poolroom, property of Ira Strickland, Jr., lessee, with intent to commit a misdemeanor within said building, to-wit, petit larceny, contrary to the form of the Statutes in such cases made and provided and against the peace and dignity of the State of Florida.

J. Frank Adams, State Attorney.

[fol. 1a] Personally appeared before me, J. Frank Adams, State Attorney for the 14th Judicial Circuit of the State of Florida, who, being first duly sworn, says that the allegations as set forth in this Information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged.

J. Frank Adams, State Attorney.

Sworn to and subscribed before me this June 19, 1961.

Bruce Collins, Clerk of the Circuit Court. By Dolores Welborn, Deputy Clerk.

The Defendant, being duly arraigned upon this information, pleaded Not Guilty. Witness my hand and official seal this July 31, 1961.

Bruce Collins, Clerk of the Circuit Court. By Dolores Welborn, Deputy Clerk.

CIRCUIT COURT OF BAY COUNTY, STATE OF FLORIDA

C-1371 61-71

STATE OF FLORIDA

vs.

CLARENCE EARL GIDEON

INFORMATION CHARGING BREAKING AND ENTERING WITH INTENT TO COMMIT A MISDEMEANOR

Witnesses for State: Ira Strickland, Jr., Henry Cook, Duell Pitts, Preston Bray, Irene Rhodes.

Filed this June 19, 1961. Bruce Collins, Clerk of the Circuit Court. By Dolores Welborn, Deputy Clerk.

[fol. 2] IN THE CIRCUIT COURT OF BAY COUNTY, STATE OF FLORIDA

EXCERPT FROM CIRCUIT COURT MINUTE BOOK OF JUNE 29, 1961

STATE OF FLORIDA

vs.

CLARENCE EARL GIDEON

#C-1371 (61-71)

BREAKING AND ENTERING

Defendant requested permission to consult counsel before being arraigned. Arraignment was, therefore, postponed until July 31, 1961, at 9:00 o'clock A.M.

[fol. 3] IN THE CIRCUIT COURT OF BAY COUNTY, STATE OF FLORIDA

EXCERPT FROM CIRCUIT COURT MINUTE BOOK ON JULY 31, 1961

Court convened at 9:00 o'clock A.M. with the Honorable Robert L. McCrary, Jr., Judge, presiding. Court was opened by proclamation of the Sheriff, and opening prayer was delivered by Judge McCrary.

The Court then called the following case:

STATE OF FLORIDA

vs.

CLARENCE E. GIDEON

#C-1371 (61-71)

BREAKING AND ENTERING WITH INTENT TO COMMIT A MISDEMEANOR

Defendant was questioned by the Court concerning his understanding of the charge filed against him and of his rights under the law. He, having answered all questions to the Court, was thereupon duly arraigned. He entered a plea of "Not Guilty". Trial was set for August 4, 1961. The Court ordered the Clerk to issue witness subpoenas for the defendant to the following: Arthur Weidencamp; Robert Richardson; Mrs. Belva Morris; and Shorty Hall.

[fol. 4] IN THE CIRCUIT COURT OF BAY COUNTY, STATE OF FLORIDA

EXCERPT FROM CIRCUIT COURT MINUTE BOOK OF AUGUST 4, 1961

STATE OF FLORIDA

vs.

CLARENCE EARL GIDEON

#C-1371 (61-71)

BREAKING AND ENTERING WITH INTENT TO COMMIT A MISDEMEANOR

The State, through its attorney, and the defendant announced ready for trial, whereupon a jury was selected, empaneled and sworn as follows: Hugh W. White, Jr., Graham A. Garren, Wallace E. Lunsford, Tage Genberg, John H. Gibbs, and C. J. Sampley. After hearing all the evidence, the jury received the charge of the Court and retired to consider of its verdict. The following verdict was returned:

"We, the jury, find the defendant, Clarence Earl Gideon, guilty as charged. So say we all."

/s C. J. Sampley, Foreman

Imposition of sentence was withheld pending receipt of an investigative report of defendant's past history.

[fol. 5] IN THE CIRCUIT COURT OF BAY COUNTY, STATE OF FLORIDA

STATE OF FLORIDA

vs.

CLARENCE EARL GIDEON

JURY'S VERDICT

We, the jury, find the defendant, Clarence Earl Gideon, guilty as charged. So say we all.

C. J. Sampley, Foreman.

[fol. 6] IN THE CIRCUIT COURT OF BAY COUNTY, STATE OF FLORIDA

EXCERPT FROM CIRCUIT COURT MINUTE BOOK OF AUGUST 25, 1961

STATE OF FLORIDA

vs.

CLARENCE EARL GIDEON

#C-1371 (61-71)

BREAKING AND ENTERING WITH INTENT TO COMMIT A MISDEMEANOR

Defendant was asked by the Court whether he had anything to say as to why the judgment of the Court and the sentence of the law should not now be pronounced against him. He, having nothing to say, the Court proceeded to propounce the following judgment and sentence:

> "You, Clarence Earl Gideon, having been convicted by a jury of the offense of Breaking and Entering with Intent to Commit a Misdemeanor, the Court adjudges you to be guilty. It is the judgment of the Court and the sentence of the law that you, Clarence Earl Gideon, for your said offense, be committed to the State Prison of the State of Florida for a period of Five Years."

[fol. 7] IN THE CIRCUIT COURT OF BAY COUNTY, STATE OF FLORIDA

UNIFORM COMMITMENT TO CUSTODY OF DIVISION OF CORRECTIONS

Fourteenth Judicial Circuit

Bay County, Fall Term, 1961

Conviction for Breaking & Entering With Intent to Commit a Misdemeanor.

Date of conviction August 4, 1961.

Date of sentence imposed August 25, 1961.

Term of sentence Five (5) years.

#61-71

STATE OF FLORIDA, Plaintiff

vs.

CLARENCE EARL GIDEON, Defendant.

In the name and by the Authority of the State of Florida, to the Sheriff of said County and the Division of Corrections of said State, Greeting:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of information, judgment and sentence, which are hereby made parts hereof:

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same, Herein fail not.

Witness the Honorable Robert L. McCrary, Jr., Judge of said Court, as also Bruce Collins, Clerk, and the Seal thereof, this the 30 day of August, 1961.

_____, Clerk of said Court.

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

[fol. 8] CERTIFICATE OF CLERK (omitted in Printing)

[fol. 1] In the Circuit Court, Fourteenth Judicial Circuit of the State of Florida in and for Bay County

State of Florida, Plaintiff,

vs.

Clarence Earl Gideon, Defendant

Reporter's Transcript of Trial

Be It Remembered That this case came on for trial in the regular Spring Term of Circuit Court in and for Bay County, Florida, on the 4th day of August, 1962 [sic-1961] before the Honorable Robert L. McCrary, Jr., one of the Circuit Judges of the above styled Court, Presiding, and a Jury drawn from the Regular Venire.

Appearances

For the Plaintiff, State of Florida: William E. Harris, Esquire, Assistant State Attorney, in and for the Fourteenth Judicial Circuit of the State of Florida, 201 East 4th Street, Panama City, Florida.

For the Defendant, Clarence Earl Gideon, The Defendant in Pro Per.

[fol. 2] Colloquy Between Court and Counsel

Court was called to Order by Deputy Sheriff, J. C. Gilbert.

His Honor, Judge McCrary, seated on the Bench.

Counsel for the State, Honorable William E. Harris, Assistant State Attorney, and the Defendant, Clarence Earl Gideon, seated at the Counsel Table.

Immediately following the formal opening of the Court the following transpired:

The Court: The next case on the Docket is the case of the State of Florida, Plaintiff, vs. Clarence Earl Gideon, Defendant. What says the State, are you ready to go to trial in this case?

Mr. Harris: The State is ready, your Honor.

The Court: What says the Defendant? Are you ready to go to trial?

The Defendant: I am not ready, your Honor.

The Court: Did you plead not guilty to this charge by reason of insanity?

The Defendant: No, sir.

The Court: Why aren't you ready?

The Defendant: I have no Counsel.

[fol. 3] The Court: Why do you not have Counsel? Did you not know that your case was set for trial today?

The Defendant: Yes, sir, I knew that it was set for trial today.

The Court: Why, then, did you not secure Counsel and be prepared to go to trial?

The Defendant answered the Court's question, but spoke in such low tones that it was not audible.

The Court: Come closer up, Mr. Gideon, I can't understand you, I don't know what you said, and the Reporter didn't understand you either.

At this point the Defendant arose from his chair where he was seated at the Counsel Table, and walked up and stood directly in front of the Bench, facing his Honor, Judge McCrary.

The Court: Now, tell us what you said again, so we can understand you, please.

The Defendant: Your Honor, I said: I request this Court to appoint Counsel to represent me in this trial.

The Court: Mr. Gideon, I am sorry, but I cannot appoint [fol. 4] Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

The Defendant: The United States Supreme Court says I am entitled to be represented by Counsel.

The Court: (Addressing the Reporter)

Let the record show that the Defendant has asked the Court to appoint Counsel to represent him in this trial and the Court denied the request, and informed the Defendant that the only time the Court could appoint Counsel to represent a Defendant was in cases where the Defendant was charged with a capital offense. The Defendant stated to the Court that the United States Supreme Court said he was entitled to it.

(Addressing the Defendant)

Are you now ready to go to trial?

The Defendant: Yes, sir.

The Court: Call a Jury, Mr. Sheriff.

Thereupon, a venire of six men were called as prospective Jurors to try this case. These six men were examined [fol. 5] as to their qualification to sit as Jurors to try this case by Mr. Harris, Assistant State Attorney, and after proper interrogation of each man called, individually and collectively, Mr. Harris announced:

The State accepts the panel, your Honor.

The Court: (Addressing the prospective Jurors)

Gentlemen, since this Defendant is not represented by Counsel, I want to ask you some questions on his behalf.

By the Court:

Q. Do any of you Gentlemen know this Defendant here, Clarence Earl Gideon?

A. No, sir.

Q. This, also, applies to all of you. Will you give him the same fair trial, and consideration, since he is not represented by Counsel, that you would if he were represented by Counsel?

A. Yes, sir.

Q. Each one of you said you did not know him, therefore, I presume you have no bias for or prejudice against him?

A. No, sir.

Q. Will each of you pay close attention to the testimony as you hear it from that witness stand and, if, after you have heard all of the testimony, there is a doubt in your mind that this Defendant is not guilty of the crime he is charged with in this Information, will you give him the benefit of that doubt and acquit him?

[fol. 6] A. Yes, sir.

Q. You will be fair to him as well as fair to the State in rendering your verdict in this case?

A. Yes, sir.

The Court: That's all the questions I have.

Now, Mr. Gideon, look these six Gentlemen over and if you don't want them to sit as a Jury to try your case, just point out the one, or more, all six of them if you want to, and the Court will excuse them and we will call another, or some others, to try your case. You don't have to have a

reason, just look them over and if you don't like their looks that's all it takes to get them excused, just point out any one, two, three, four, five or all six of them if you want to and the Court will excuse them.

The Defendant: They suit me allright, your Honor.

The Court: You are willing for these six men to try your case?

The Defendant: Yes, sir.

The Court: You accept them as a Jury to try your case?

The Defendant: Yes, sir.

[fol. 7] The Court: You are willing for these six men to sit as a Jury and try your case, now, are you?

The Defendant: Yes, sir.

The Court: Swear the Jury, Mr. Clerk.

Thereupon, the six men selected and accepted to try this case were sworn as a Jury by Honorable Bruce Collins, Clerk of the Circuit Court of Bay County, Florida.

The Court: You may proceed.

The witnesses were called, admonished by the Court, and put under the rule.

Mr. Harris, the Assistant State Attorney, then read the Information on file in this case to the Jury and told them what he expected the testimony on behalf of the State to show.

The Court: Mr. Gideon, would you like to tell the Jury what you expect the evidence in your behalf to show?

The Defendant: Yes, your Honor, I would like to.

The Court: Allright, you may do so at this time. Just [fol. 8] walk right around there where you can see them, and they can see you, and tell them what you expect the evidence to show in your favor. Talk loud enough for them to hear you, now.

At this point the Defendant walked around the Counsel Table and stood facing the Jury and told them what he expected the evidence on his behalf to show.

Mr. Harris: May we proceed, your Honor?

The Court: Yes, you may proceed.

The Plaintiff, State of Florida, to sustain the allegations contained in the Information on file in this case, then offered the following testimony.

IRA STRICKLAND, JR., called as a witness on behalf of the Plaintiff, State of Florida, being first duly sworn by the Clerk of this Court, testified as follows:

Direct examination.

By Mr. Harris:

Q. Will you state your name, please?
A. Ira Strickland, Jr.
Q. Where do you live, Mr. Strickland?
A. 3307 Second Place, Springfield.
Q. Is that in Bay County, Florida, Mr. Strickland?
A. Yes, sir.
[fol. 9] Q. What is your present occupation?
A. Sir?
Q. What do you do for a living?
A. I own the Bay Harbor Pool Room.
Q. Did you own the Bay Harbor Pool Room on June 3, 1961?
A. Yes, sir.
Q. You were operating it there on that date?
A. Yes, sir.
Q. Do you own the building and the land?
A. No, sir, I rent.
Q. From whom do you rent?
A. Mr. Widincamp—Arthur Widincamp.
Q. And you were operating that place on that date?
A. I was.
Q. What time did you close your business up?
A. Twelve o'clock, that night.
Q. Were you the last one to leave the building?
A. Yes, sir.
Q. Did you lock and secure the place?
A. Yes, sir.
Q. All the doors were locked and all the windows closed and fastened?
A. Yes, sir.
[fol. 10] Q. When did you enter the building again?
A. The next morning, about eight o'clock.
Q. What did you find when you went back to the building?
A. I found Mr. Pitts and a couple of other Gentlemen were there waiting until I came down that morning. The

entrance to the building had already been detected at that time, when I arrived there. I was called out and when I arrived that's what I found.

Q. When you looked around the building did you find where entrance was made?

A. Yes, sir.

Q. How was it made?

A. Through a window that didn't have any bars on it, in the back of the building.

Q. Did you find anything damaged inside, other than the window being broken out?

A. A Cigarette Machine and "Juke" Box had been broken into, and some stock had been removed.

Q. What stock had been removed, or was missing?

A. A small amount of Beer and some Wine.

Q. Do you know whether there was any money in the Cigarette Machine and the "Juke" Box?

A. Yes, sir, there was money in each one of them.

Q. Do you know the amount?

A. No, sir, I don't.

[fol. 11] Q. You know there was money in those machines prior to the time they were broken into?

A. Yes, sir, I do know that.

Q. You had no way of knowing how much money was in either one?

A. No, sir, I didn't. They were the kind that operates automatically.

Q. They were both of the same kind, that is, operated automatically, the kind where you put your money in and get your Cigarettes, or play music?

A. Yes, sir, they was.

Q. Where is the Bay Harbor Pool Room located?

A. 109 Edwin Avenue.

Q. Panama City, Florida.

A. Yes, sir.

Q. These things you have testified about occurred on June 3, 1961?

A. Yes, sir.

Q. In Bay County, Panama City, Florida?

A. Yes, sir.

Mr. Harris: You may inquire.

Cross-examination.

By the Defendant:

Q: Would you give the Jury a description of the building?
[fol. 12] A. I didn't understand the question.

The Court: (Addressing the Defendant.)
'Would you give the Jury a description of the building.' Was that your question?
The Defendant: Yes, sir.
The Court: (Addressing the witness.)
Did you understand the question then?
The Witness: Yes, sir.
The Court: Go ahead and answer it.
Witness: A. I believe it's approximately twenty-five feet (25') wide and a hundred feet (100') long. There is a small partition between the building, but no door attached, just a dividing partition, with a Bar running along with the building, longthwise. All of the windows, except two in the rear, had bars in them; there had been an addition put on to the building and at that time there were no bars installed in those windows. But after this happened we have installed bars there. I believe that is about as near as I can get at it for you.

By the Defendant:

Q. Where does the "Juke" Box sit in the building?
[fol. 13] A. In the extreme front of the building.
Q. Where does the Cigarette Machine sit in the building?
A. It also sets in front of the building.
Q. Did you see these machines after they had been broken into?
A. Yes, sir.
Q. How was this window broken?
A. When I arrived that morning the window was broken out. There was a garbage can that had been removed from the back and carried around to the side and I assumed the purpose of it was to enter the building through the window, to step up on.
Q. What is the size of that window?
A. What is the size?
Q. Yes.

A. I couldn't say exactly, I don't know the exact dimensions, I would say it's about twenty four by thirty two (24x32").

Q. What type window was it?

A. It was a Glass Window. I couldn't tell you the brand name of it, I don't know who it was made by.

Q. How does it open?

A. Lifts, up and down.

Q. Could you open the window?

A. Yes, sir, by unlocking it. It had a latch on the inside, in the middle of the window, that secured it from being [fol. 14] moved up or down from the outside when the latch was fastened on the inside. You had to unlatch it inside in order to move it either way.

Q. Lots of windows lift up and down to open don't they?

A. Yes, sir.

Q. In what respect was the window broken?

A. I couldn't tell you that, but the window was broken out. The glass was broken out, all the glass was out of it.

Q. Was it broken from the inside or the outside?

A. I assume that it was broken from the outside.

Q. Mr. Strickland, did you ever go off and leave your building unlocked?

A. Yes, sir.

Q. You have?

A. Yes, sir, I have, for a short while.

Q. Did you ever go off and leave it unlocked over night?

A. No, sir.

Q. Did you ever leave your building open?

The Court: I don't think that has any bearing on this case. The testimony here is that the building was securely locked on the night of this entrance into it through a broken window. That particular time is all we are interested in here, what has been done prior to this time would have no bearing on this case.

[fol. 15] By the Defendant:

Q. You locked the building that night?

A. Yes, sir.

Q. You are positive of that?

A. I am positive, yes, sir.

Q. Do you know positively what merchandise was removed from the building?

A. No, sir, I don't. I do know there was some Wine and Beer taken out, but I can't tell you exactly how much, it was removed from the shelves in the Bar.

Q. I wish you would tell this Court and Jury just what this person took out of the building.

A. I can't tell them exactly what was taken out, I don't know.

Q. What do you mean by 'I don't know,' you have said that certain things were taken out, or removed from the building. Now, will you tell the Court and Jury just exactly what was taken out, how much of each item was taken, that you have stated was taken, including the money you say was in the "Juke" Box and Cigarette Machine?

The Court: This witness has testified that he did not know how much Wine or Beer was taken. He has also stated that he had no way of knowing how much money was in the "Juke" Box and Cigarette Machine, because they were both automatic machines and he had no way of knowing.

[fol. 16] Do you want to ask him any more questions?

The Defendant: No, sir, that's all.

Mr. Harris: Come down, Mr. Strickland.

This witness then left the stand.

Henry Cook, called as a witness on behalf of the Plaintiff, State of Florida, being first duly sworn by the Clerk of this Court, testified as follows:

Direct examination.

By Mr. Harris:

Q. Will you state your name, please?

A. Henry Cook.

Q. Where do you live, Mr. Cook?

A. 108 East Avenue.

Q. Is that in Panama City, Bay County, Florida?

A. Yes, sir.

Q. Do you know where the Bay Harbor Pool Room is?

A. Yes, sir.

Q. Where is it located?

A. 109 Edwin Avenue.

Q. Panama City, Bay County, Florida?

A. Yes, sir.

Q. Were you in, or near, the Bay Harbor Pool Room on [fol. 17] June 3, 1961?

A. Yes, sir.

Q. At what time?

A. Approximately five-thirty, A.M.

Q. Five-thirty in the morning?

A. Yes, sir.

Q. Do you know Clarence Earl Gideon, this man sitting here at the Counsel Table?

A. Yes, sir.

Q. Did you see him there that morning?

A. Yes, sir.

Q. Where did you see him?

A. I saw him in the Pool Room.

Q. What was he doing when you saw him in the Pool Room?

A. He was standing up by the Cigarette Machine.

Q. Was he doing anything to the Cigarette Machine?

A. No, sir, not that I seen.

Q. Did you see anyone else in the Pool Room at that time?

A. No, sir.

Q. No one but Mr. Gideon was in there?

A. He is the only one I saw.

Q. What did you do, just stand there and watch him?

A. I stood and watched him for a few seconds, maybe a full minute, or a little more.

Q. Then what did you do?

[fol. 18] A. I walked on down to the corner, and came back, and he came out.

Q. You saw him when he came out of the Pool Room?

A. Yes, sir.

Q. How did he come out?

A. At the back door.

Q. Came out the back door?

A. Yes, sir.

Q. What did he do then?

A. Went down to the Drug Store and called a Cab.

Q. Did you see anything on him?

A. I saw that he had some Wine.

Q. You saw some Wine on him?

A. Yes, sir.

Q. Is that all you could see on him?

A. I saw his pockets bulged out, but I didn't know what was in them.

Q. Did you go back to Bay Harbor Pool Room after that?

A. Yes, sir.

Q. Did you see Mr. Gideon when he got in the Cab?

A. Yes, sir.

Q. Then, what did you do?

A. I went back down to the Pool Room and I saw it had been broken into.

Q. How did you determine that?

[fol. 19] A. Well, I saw the face of the Cigarette Machine open and 'stuff' laying on the Pool Table.

Q. Was that the same Cigarette Machine that you saw Mr. Gideon standing next to?

A. Yes, sir.

Q. When you first saw him in there did you see anything wrong with the Cigarette Machine?

A. I didn't notice, I just seen him.

Q. When you first looked in there and saw him you saw him standing by the Cigarette Machine?

A. Yes, sir.

Q. And you didn't see anything wrong with the Cigarette Machine then?

A. No, sir.

Q. After he left in the Cab and you came back, then, you found the Cigarette Machine had been broken into?

A. Yes, sir.

Q. Did you find any other damage done there in the Pool Room?

A. Well, I seen 'stuff' laying on the pool table there, 'stuff' that he had pulled out of the machine, I suppose, the money box was laying on the pool table and the Cigarette Machine was all torn up, the face and all was lying there on the table with the money box.

Q. What did you do after you saw him come out of the building, Mr. Cook?

[fol. 20] A. I went up to the corner and watched him get in a Cab.

Q. With a Cab Driver?

A. Yes, sir.

Q. Did you know the Cab Driver?

A. Yes, sir.

Q. Was that Preston Gray?

A. Yes, sir.

Q. When you went back to the building, after you saw Mr. Gideon come out of the building, out the back door, did you see any broken window in the building?

A. Yes, sir, there was a window broken out.

Q. Did you see anything else, besides the broken window?

A. I saw a Red Can by the window.

Q. And the window was broken out?

A. Yes, sir.

Q. That was all the damage you saw that had been done to the building, just a window broken out?

A. Yes, sir.

Mr. Harris: You may inquire.

Cross-examination.

By the Defendant:

Q. How long have you lived here?

A. About five years.

Q. Have you ever been arrested?

[fol. 21] Mr. Harris: The State objects to that question, if the Court please. That is an improper question.

The Court: Objection sustained.

Mr. Gideon, you can ask him if he has ever been convicted of a criminal offense. That would be a proper question if you want to prove whether he has been convicted of a criminal offense.

By the Defendant:

Q. Have you ever been convicted of a felony.

A. No, sir, never have.

Q. On this morning when you claim you were out at five-thirty, what were you doing out at that time of the morning?

A. I had just come from a dance, down in Apalachicola —stayed out all night.

Q. Was it dark or daylight?

A. It was dark enough that I had to put my head up to the window to see you—but I seen you.

Q. And where did you go after that?

A. I walked up to the corner.

Q. You walked up to the corner, eh?

A. Yes, sir.

Q. When was the next time you seen me?

A. When I saw you walk up and get in the Cab.

[fol. 22] Q. Didn't you just get through saying you saw me come out the back door of the Pool Room?

A. You said the 'next time'—I first saw you through the window, in the Pool Room, standing up by the Cigarette Machine—the next time I saw you then was when you come out the back door and walked up to the corner and called a Cab—and the next time I saw you was when you walked up and got in the Cab.

Q. How could you see me come out of the back door?

A. I seen you come out just as I walked by.

Q. You say I come out of the building and walked up to the corner, how did you see me?

A. You were there about the same time I was—it was you—I'm definitely sure of that.

Q. You said I was carrying something—what was I carrying?

A. A pint of Wine.

Q. A 'what'?

A. A pint of Wine.

Q. A pint of Wine?

A. Yes, sir, a pint of Wine.

Q. Do you know positively that I was carrying a pint of Wine?

A. Yes, I know you was.

Q. How do you know that?

A. Because I seen it in your hand.

[fol. 23] Q. And you saw me with a pint of Wine?

A. Yes.

Q. How far away from me were you?

A. I was about twenty yards, or less, something like that.

Q. Do you know where I live out there?

A. Yes.

Q. Where do I live?

A. You live in the Bay Harbor Hotel.

Q. Where is it at?

A. Right across the street from the Pool Hall.

Q. Did I do anything out of the way?

A. Well, you acted kinder drunk. I didn't know whether you was or not.

Q. Would you say I was drunk?

A. I don't know for sure, so I couldn't say.

Q. You are positive that you saw me come out of the Pool Room, when there are two buildings that you would have to see around, if you were on the corner as you said, to positively see me, or anyone else?

A. I'm positive I saw you come out, yes.

Q. You were standing on the corner?

A. I was standing on the corner shortly before you walked out, when I walked by you walked out the back door.

Q. Did you see this so-called window that was broken out in the building?

[fol. 24] A. Say that again, I didn't understand you.

Q. Did you see that window that was broken out?

A. Yes, I saw it.

Q. How was it broken?

A. Well, it was broken all-to-pieces, it was laying outside on the ground.

Q. No glass left in it at all?

A. There might have been a small piece left in the corner, but that's all, if there was any.

Q. All the glass was on the outside of the building?

A. All that I saw was on the outside.

The Defendant. That's all.

The Court: You don't want to ask him any more questions?

The Defendant: No.

Redirect Examination.

By Mr. Harris:

Q. Mr. Cook, you had already seen this man inside the building before you saw him come out the back door of the building?

A. Yes, sir.

Q. Did you know Mr. Gideon before that time?

A. Yes, sir.

[fol. 25] Mr. Harris: The State rests. That's our case, your Honor.

The Court: Allright, Mr. Gideon, the State has put on its case. You have a right now to take the stand, if you wish to, you will not be required to take the stand; and it will not be held against you if you do not take the stand, but if you want to you can take the stand and tell the Jury your side of this case, and if you do take the stand and testify, then, the State Attorney will have the privilige of asking you questions on cross examination about what you testified to.

Would you like to take the stand now, or would you like to call your witnesses first and decide later whether you want to take the stand or not?

The Defendant: I would like to call my witnesses.

The Court: Allright. Just tell the Sheriff who you would like called and he will call them.

The Defendant, to sustain his plea of not guilty to the charge contained in the Information on file in this case, then offered the following testimony.

[fol. 26] The Court: You understand, Mr. Gideon, that the witnesses you call are your witnesses, and it's up to you to vouch for them. You understand that do you?

The Defendant: Yes, sir, I understand it.

The Court: Allright. Who would you like to have called?

The Defendant: Henry Berryhill, Jr.

The Court: Call Henry Berryhill, Jr., Mr. Sheriff.

Henry Berryhill, Jr., called as a witness on behalf of the Defendant, being first duly sworn by the Clerk of this Court, testified as follows:

The Court: Mr. Berryhill, you have been called as a witness on behalf of Clarence Earl Gideon, who is on trial upon an Information charging him with Breaking and Entering with Intent to Commit a Misdemeanor. He will ask you some questions.

(Addressing the Defendant)

You may inquire.

Direct examination.

By the Defendant:

Q. Mr. Berryhill, would you mind telling the Jury and [fol. 27] the Court what time you were called in to investi-

gate this Breaking and Entering of the Bay Harbor Pool Room?

A. I did not have a call, Mr. Gideon, I was Patrolling the area, checking the buildings, at approximately five or five-fifteen in the morning.

Q. Who notified you?

A. Nobody notified me, I found the door open in the building and I checked with a fellow up at the front of the building, a Mr. Cook, and from his report, he said he saw you leave the building.

Q. Did you notify anybody then?

A. Yes, sir, I called the Investigation Department, which was Lavelle Pitts.

Q. Did you call him yourself?

A. Yes, sir.

Q. How was entrance gained into the building?

A. Through a window, on the North side of the building, the back, to the left of the back door.

Q. Was it broken completely out?

A. Yes, sir.

Q. Was it broken from the inside or outside?

A. It was broken from the outside.

Q. How could you tell it was broken from the outside?

A. Because part of the glass was on the inside, some of it was outside where they had pulled the rest of it out after it was broken.

[fol. 28] Q. You are positive the window was broken from the outside?

A. Yes, sir, it was.

Q. You wouldn't know about what time it was broken would you?

A. No, sir. It was broken when I discovered it, but I don't know how long it had been broken.

The Defendant: That's all.

The Court: Any questions by the State?

Mr. Harris: No questions, your Honor.

The Court: Mr. Berryhill, let me ask you if you work at night?

Witness: Yes, sir, I work at night.

The Court: Any objection from the State or the Defendant to excusing Mr. Berryhill? He looks like he needs to get some sleep.

Mr. Harris: No objection from the State.

The Court: Mr. Gideon, do you have any objection to Mr. Berryhill being excused? Do you think you might want to call him back later?

[fol. 29] The Defendant: No sir, I have no objection. I don't plan to call him back.

The Court: You may be excused, Mr. Berryhill.

Witness: May I leave the Court House now?

The Court: Yes, sir, you may go home— or anywhere you would like to go, you are excused and may leave at this time, if you would like to.

Witness: Thank you, Judge.

This witness then left the stand.

Duell Pitts, called as a witness on behalf of the Defendant, being first duly sworn by the Clerk of this Court, testified as follows:

The Court: Mr. Pitts, you have been called as a witness here on behalf of Clarence Earl Gideon, who has been charged in an Information with Breaking and Entering with Intent to Commit a Misdemeanor. He will ask you some questions.

(Addressing the Defendant)

You may proceed.

[fol. 30] Direct examination.

By the Defendant:

Q. Mr. Pitts, will you tell the Court and this Jury what you found when you arrived at the Bay Harbor Pool Room, on the morning of June 3, this year, when it is alleged the place was broken into?

A. Well, when I got there I went inside and found the Cigarette Machine and the "Juke" Box had been broken into, and on further investigation I found that a window on the North side of the building had been broken into, apparently, to gain entrance to the building inside.

Q. Was the whole window broken?

A. No, it wasn't all broke out, there was some small

pieces of glass left in the top corners, but most of it was broke out.

Q. How much of it was broken out?

A. Approximately twenty inches to twenty-four inches (20-24") wide and two to two and one-half feet long, something like that.

Q. Was this window broken from the inside or outside?

A. I would say from the outside.

Q. Mr. Pitts, has it ever occurred to you, or did you ever an idea that I might have broken that window out?

A. That's what you are up here on trial for.

Q. But did you ever investigate to see whether or not [fol. 31] I broke it out?

A. We had an eye-witness to it, Mr. Cook saw you when you came out of the building.

Q. That was satisfactory to you?

A. Yes, I was fairly satisfied with what he told me, I had no reason to doubt it.

Q. How did you determine the window was broken from the outside?

A. From the way the glass fell. If a window is broken from the outside most of the glass will fall inside, and most of this glass was on the inside.

The Defendant: That's all.

The Court: Any questions by the State?

Mr. Harris: I would like to ask him one question.

The Court: You may proceed.

Cross-examination:

By Mr. Harris:

Q. Mr. Pitts, will you tell us whether or not you are a Deputy Sheriff in Bay County, Florida, and if so, were you such Deputy Sheriff on the 3d day of June, 1961?

A. Yes, sir, I was a Deputy Sheriff of Bay County, [fol. 32] Florida, on the 3rd day of June, 1961, and I am still a Deputy Sheriff, and I work in the Investigation Department of the Sheriff's Office of Bay County, Florida.

Mr. Harris: That's all.

This witness then left the stand.

PRESTON BRAY, called as a witness on behalf of the Defendant, being first duly sworn by the Clerk of this Court, testified as follows:

The Court: Will you state your full name, for the record, please.

Witness: Preston Bray.

The Court: Where do you live?

Witness: 3409 Second Court, Panama City, Bay County, Florida.

The Court: Clarence Earl Gideon is being tried here on a charge of breaking and entering the Bay Harbor Pool Room. Do you know anything about that?

Witness: No, sir, I don't.

The Court: He wants to ask you some questions. You [fol. 33] may proceed.

Direct examination

By the Defendant:

Q. Preston, the morning I called you, as a Cab Driver you were driving a Cab weren't you, is that right?

A. That's right.

Q. Was it anything out of the ordinary for me to call you?

A. No, sir, you called me all the time.

Q. That morning did I have any Wine, Beer, Whiskey or any other intoxicating drinks on me, or with me?

A. No, sir, not that I could see.

Q. If I had had any I would have to have had it in my pocket wouldn't I?

A. Yes, sir, I believe so, you didn't have any bag and had nothing in your hands, that I seen.

Q. Preston, you and I are pretty good friends, is that true?

A. Yes, sir.

Q. I'm in the habit of going to your house and drinking Coffee, not every morning, but lots of mornings I do that?

A. Yes, sir.

Q. Was there anything out of the ordinary in me walking out of that Public Telephone Booth there on the corner?

A. I wouldn't know that.

Q. I live across the street from there do I not?
A. Yes, sir.
[fol. 34] Q. That is a Public Telephone Booth there on the corner where you picked me up that morning?
A. Yes, sir, it is.
Q. Would you say I was intoxicated that morning?
A. No, sir, I wouldn't.
Q. Did I give any reason for going to town?
A. No, you didn't.

The Defendant: I don't think there's anything else I want to ask him.
The Court: Does the State have any questions?
Mr. Harris: Yes, your Honor.

Cross-examination.

By Mr. Harris:

Q. Mr. Bray, did I understand you to say you had known Mr. Clarence Earl Gideon for sometime?
A. Yes, sir.
Q. Do you know whether or not he was unemployed at that time, and had been unemployed for sometime?
A. I know he was working at the Pool Room—now, whether he was getting paid or not, I don't know.
Q. Did he ride your Cab regularly, fairly regularly?
A. Not regular, but when he needed a Cab he always called me.
[fol. 35] Where did you take him on this morning?
A. Fourth and Harrison.
Q. That is right uptown in the City of Panama City?
A. Yes, sir.
Q. You just let him out on the street there?
A. Yes, sir.
Q. How much was the Cab fare?
A. A dollar ($1.00).
Q. Did he give you a tip?
A. Yes, sir.
Q. How much tip did he give you?
A. Fifty cents.
Q. What kind of money did he pay you with?
A. Quarters.

Q. Was it a custom for him to tip you?

A. Yes, sir, every time he's ever rode in my Cab he's give me a tip.

Q. Did he give you a dollar tip that morning?

A. No, sir, just fifty cents—he give me two quarters.

Q. Has he ever given you a dollar tip?

A. Yes, sir.

Q. Did he ever give you a two-dollar tip?

A. No, sir, just a dollar—that's the most he ever give me.

Mr. Harris: That's all.

[fol. 36] The Court: You may come down, Mr. Bray.

Witness: Judge, may I be excused now? I need to get back to work.

The Court: Do either of you have any objection to this witness being excused?

Mr. Harris: The State has no objection, your Honor.

The Court: How about you, Mr. Gideon, do you have any objection to this witness being excused? He's your witness, now, and if you think you might want to recall him we will not excuse him.

The Defendant: No, sir, I don't want to recall him. Let him go.

The Court: You may go.

Witness: Thank you, Judge.

This witness then left the stand.

Mrs. Irene Rhodes, called as a witness on behalf of the Defendant, being first duly sworn by the Clerk of this Court, testified as follows:

[fol. 37] The Court: Will you state your name, please?

Witness: Irene Rhodes.

The Court: You have been called here as a witness by Clarence Earl Gideon. He wants to ask you some questions.

(Addressing the Defendant.)

You may inquire.

Direct examination.

By the Defendant:

Q. Mrs. Rhodes, you were called as a State witness in my Preliminary trial by the State Attorney?

A. I'm sorry, Judge, but I did not understand one word that man said.

The Court: Mr. Gideon, talk louder, the witness didn't understand one word you said. Please take that paper you have in your hand from over your mouth, lay it down on the table, and speak out where we can all hear you.

Mr. Harris: I understood the question, and I object to it, if the Court please, it's an improper question.

The Court: Well, I didn't understand it, so I can't rule on it being proper or improper.

[fol. 38] Go ahead now, Mr. Gideon, with your questions, and talk loud enough for all of us to hear you, I'm having difficulty trying to hear you, and the witness didn't understand anything you said. You may proceed.

By the Defendant:

Q. Mrs. Rhodes, on this morning that this crime was committed where were you?

A. On my porch.

Q. Your front porch?

A. "Uh-hu."

Q. You can see up and down the Street from your front porch?

A. "Uh-hu."

Q. You can also see down the street to the Public Telephone Booth, is that right?

A. "Uh-hu", right.

Q. The night before this crime was committed, early the next morning you and I had been drinking hadn't we?

A. Well, now, I don't know about that. I might have been in the Bar.

Q. Did you, or did you not, buy me Beer that night?

A. A drink?

Q. Yes.

A. I probably did, if you needed one.

Q. When did you first know the place had been broken into?

[fol. 39] A. When the young man . . . what's his name, Cook . . . Henry Cook, when he walked up to the porch and told me.

Q. Walked up to your porch?

A. Yes.

Q. Did he leave down there before I left the Telephone Booth?

A. Yes. He left and called the "Cops."

Q. Called the "Cops?"

A. Yes.

Q. He didn't go back down to the Pool Hall then?

A. No.

Q. Did he ever tell you that he seen me come out of this place?

A. No.

Q. When you first saw me where was I?

A. When you came out of the Alley and walked over to call a taxi.

Q. Mrs. Rhodes, will you tell this Court and Jury where I lived at this time?

A. Well, you lived down there at that hotel, but I don't know the name of it.

Q. Is it common for me to come out through the Alley?

A. That's right—I didn't think a thing about it—and when you called a Cab, I didn't think anything about that, either. I just thought you were going down town.

[fol. 40] Q. This Mr. Cook, when he come from toward the Pool Room to your place, where you were on the porch, that was about a half-block wasn't it?

A. About a half-block, yes.

Q. Could he have seen me come out the back door of that place from where he was?

A. No, I don't think so.

Q. Could you see the back door of that Pool Room from where you were?

A. No, sir.

Q. It would be impossible for him to see the back door of that place from where he was, right?

A. Right.

Q. All you saw me do was emerge from the Alley, go to the Telephone Booth and call a Cab and go away, right?

A. Well, of course, I didn't see you call the Cab, but shortly after you went in the Telephone Booth a Cab came and you got in it and left, and I just thought you called a Cab, by one coming so quick afterwards.

The Defendant: That's all.

The Court: Any questions by the State?

Mr. Harris: Yes, your Honor.

[fol. 41] Cross-examination.

By Mr. Harris:

Q. Mrs. Rhodes, did you go over to the Telephone Booth where Mr. Gideon had made the 'phone call from?

A. Did I what?

Q. Did you go over to the 'phone booth, where this man made the 'phone call from?

A. Yes.

Q. Why did you go over there?

A. Well, I just went over there, that's all.

Q. He had put that Wine down there and you went over there and got it didn't you?

A. Yes.

Q. You saw him when he put it there didn't you?

A. It was there, I saw it there, and I picked it up.

Q. You knew he put it there and you went over there and got it?

A. Yes, I went over there and got it.

Mr. Harris: That's all.

Redirect examination.

By the Defendant:

Q. Mrs. Rhodes, did you get any Wine from the Telephone Booth?

A. Yes, I did.

Q. Was it inside or outside the booth?

[fol. 42] A. Outside.

Q. Was it a bottle of Wine?

A. Yes, (measuring on finger), there was about this much in a bottle.

Q. What kind of Wine was it?

A. I don't know, I didn't pay no attention to it, I gave it to my Landlord.

Q. Gave it to your Landlord?

A. Yes, because he was sick.

Q. Would you say that was my Wine?

A. I don't know whose it was.

The Defendant: That's all.

Re-cross-examination.

By Mr. Harris:

Q. You didn't see this man put the Wine down there?

A. No, I didn't.

Q. Had you seen it there before he got to the 'phone booth?

A. I had no reason to go down to the 'phone booth, truthfully. I went down there to ask him if the Bar was open, truthfully; I know he helps out in there occasionally, and my Landlord, as I was telling you, he was sick and I saw this bottle of Wine, what there was in the bottle, sitting there on the outside of the 'phone booth and I picked it up and carried it and gave it him.

[fol. 43] Mr. Harris: That's all. You can come down.

This witness then left the stand.

Arthur Widincamp, called as a witness on behalf of the Defendant, being first duly sworn by the Clerk of this Court, testified as follows:

The Court: Will you state your name, please.

Witness: Widincamp, Arthur Widincamp (spelling name) W-i-d-i-n-c-a-m-p—its a rather odd name to spell, unless you are used to it.

The Court: You have been called as a witness by Clarence Earl Gideon, who is charged in an Information with Breaking and Entering with Intent to Commit a Misde-

meanor, he wants to ask you some questions. (Addressing the Defendant) You may proceed.

Direct examination.

By the Defendant:

Q. Mr. Widincamp, you are the owner of this building the Bay Harbor Pool Room is located in?

A. Right.

Q. Were you called to the building the morning this [fol. 44] crime was committed?

A. What morning?

Q. The morning this building was broken into, or was supposed to have been broken into?

A. Yes. I tried to call Ira Strickland and he didn't have a Telephone and I went down to his house and picked him up and carried him down there that morning.

Q. Were you around there when the Police was called?

A. The Police was already in there whenever we got there.

Q. Did you find a window broken out?

A. Yes, sir, the window on the North side, at the back, it was, was broken out and there was a drum setting up there at the window. The window was out — I know that — because I had to replace it, myself.

Q. Did Mr. Cook, at that time, say that I was the one that broke that window?

A. I don't know anything about Mr. Cook — I was down there that morning and I saw the Police there when I got there; I carried Ira Strickland with me.

Q. Did you check that window?

A. Yes, I looked at it — it was just broke out, that's all there was to it.

Q. How was this window broken?

A. Now, I don't know how it was broken, but it was broken, and the hole in it was big enough for a man to go through.

[fol. 45] Q. How was it broken?

A. It was just broke, that's all I know, the glass was broke out, but how it was broke, I do not know.

Q. Was it broken completely out?

A. Most of it was out, there was some small pieces left

in the corners at the top, but it was big enough for anybody to go through it.

Q. You mean by that that it was large enough for a person to crawl through?

A. Yes, sir.

Q. Could that window possibly have been broken by something besides a human being?

A. I don't think so. I know of nothing but a human being that would put a drum up by it.

Q. Do you know definitely that somebody broke that window?

A. Somebody had to break it.

Q. You fixed the window yourself?

A. Yes.

Q. You don't know of your own knowledge who broke it do you?

A. No, I wasn't there.

Q. You have no reason to believe Mr. Strickland broke that window out do you?

A. I've got no right to say who broke it, I can't say who [fol. 46] broke it because I didn't see anybody break it; I have no reason to believe that Ira Strickland broke it, no reason on earth to even suspect that he might have done it.

Q. If the Court sent this Jury out there to see this place they would find a new window pane in that window would they?

A. Yes, they would. There is also bars over that window now.

Q. Are you acquainted with Mr. Stickland?

A. I reckon I am, he's my son-in-law.

Q. Do you know that business well?

A. I guess I do, I run it eight months myself.

Q. Did you ever know of his leaving the building unlocked?

A. No, I don't know anything about that—but I don't think he did—I don't think he would do a thing like that.

Q. But he does drink, don't he?

A. Well, that's his business, I don't know anything about that.

The Defendant: That's all.

The Court: Any questions by the State?

Mr. Harris: No questions, your Honor.
This witness then left the stand.

[fol. 47] G. F. HALL, called as a witness on behalf of the Defendant, being first duly sworn by the Clerk of this Court, testified as follows:

The Court: Will you state your name, for the record, please.

Witness: I sign my name as G. F., but I'm known as "Shorty" nobody hardly knows my name, except my family, everybody calls me "Shorty."

The Court: Where do you reside, what is your address?

Witness: Springfield Station, Panama City, Bay County, Florida.

The Court: You have been called here as a witness by Clarence Earl Gideon, who is being tried on an Information charging him with Breaking and Entering with Intent to Commit a Misdemeanor. He wants to ask you some questions. (Addressing the Defendant.) You may proceed.

Direct examination.

By the Defendant:

Q. Mr. Hall, you work around there at the Bay Harbor Pool Hall don't you?

A. Yes, sir.

Q. On the morning this crime was committed were you around there?

[fol. 48] A. No, sir. I got there about nine o'clock, when I got up.

Q. Were Officers there investigating when you got there?

A. It was all done over with when I got there.

Q. Did you see the window that was broken out?

A. Yes, sir, I saw the window that was broke out.

Q. Was it completely broken out?

A. Yes, sir.

Q. All the glass was out of it?

A. Practically all of it, there were some small pieces left in the corners at the top, but the principal part of it was out.

Q. Who repaired that window?

A. I can't call his name right now—I'll think of it to-reetly, maybe.

Q. Mr. Strickland didn't repair it?

A. "Strick" had it repaired, but I'm trying to think of the man's name that replaced the window.

Q. Who had it repaired?

A. Strickland, the man that runs the place.

Q. You have no reason to believe Mr. Strickland broke that window out do you?

A. I couldn't say who done it—I have no right to believe who done it, because I didn't see nobody break it—No, I have no reason to believe Mr. Strickland done it.

[fol. 49] Q. Can you say how many Cigarettes were taken off?

A. I can't answer that question. I don't know how many Cigarettes were missing—I just saw there was some Cigarettes missing out of the machine when I got there, they was waiting to get an investigation on everything and was calling the "Machine man" to come straighten up the machine.

The Defendant: That will be all.

The Court: Any questions by the State?

Mr. Harris: Yes, your Honor.

Cross-examination.

By Mr. Harris:

Q. Mr. Hall, did you find the Cigarette Machine had been broken into?

A. Yes, sir.

Q. How about the "Juke" Box?

A. It had been broken into, too, yes, sir, both of the machines had been broken into.

Mr. Harris: That's all.

The Court: You may come down.

This witness then left the witness stand.

[fol. 50] ROBERT RICHARDSON, called as a witness on behalf of the Defendant, being first duly sworn by the Clerk of this Court, testified as follows:

The Court: Will you state your name for the record, please.

Witness: Robert Richardson.

The Court: What is your address?

Witness: 1404 Gulf Avenue, Panama City, Florida.

The Court: Mr. Richardson, you have been called here as a witness by Clarence Earl Gideon, who is on trial here upon an Information charging him with Breaking and Entering with Intent to Commit a Misdemeanor. He wants to ask you some questions. You may inquire, Mr. Gideon.

Direct examination.

By the Defendant:

Q. Mr. Richardson, you work as a Bar Tender at the Bay Harbor Bar do you not?

A. Yes, sir.

Q. How long have you been working there?

A. Approximately a year.

Q. You are well acquainted with Mr. Strickland?

[fol. 51] A. Junior Strickland?

Q. Yes, sir.

A. Yes, sir, I am well acquainted with him.

Q. Does he have a habit of drinking Whiskey in your Bar?

A. I don't know whether it would be a habit or not, occasionally he does.

Q. Does he have a habit of going behind the Bar and getting Whiskey and drinking it every day?

A. He has done that, but not every day, just occasionally he does that.

Q. The morning this crime was committed, what time did you go to work that morning?

A. Seven o'clock.

Q. Did you have occasion to go around and look to see if this building was broken into?

A. When I walked in—the rumor had already spread that it had been broken into—so I walked around to the

building, on the sidewalk, and I seen an Oil Can, or a Drum, it was a big can, I can't say exactly what it was, but I seen it setting up beside the window, so I just asked Miss Rosé if it had been reported, did Mr. Strickland know about it, she said she didn't know, so I tried to call Mr. Strickland, but he didn't have a 'phone number listed, so I called his Father-in-law, Mr. Widincamp, and he got in touch with him and told him that his place had been broken into.

[fol. 52] Q. Did you go back to the window?

A. No, I didn't go back to the window, I just looked at it from the sidewalk, I saw it was broken out but I didn't go back close to it.

Q. Do you have any knowledge of how that window was broken?

A. No, I have no idea how it was broken—all I know is that it was broken out.

Q. You don't know who broke it?

A. No, I wouldn't have any idea.

The Defendant: That's all.

The Court: Any questions by the State?

Mr. Harris: No questions by the State, your Honor.

The Court: You may come down, Mr. Richardson.

This witness then left the stand.

Mrs. Velva Estelle Morris, called as a witness on behalf of the Defendant, being first duly sworn by the Clerk of this Court, testified as follows:

[fol. 53] The Court: Will you state your name for the record, please?

Witness: Velva (spelling) V-e-l-v-a Estelle Morris.

The Court: Where do you reside?

Witness: Sorry, I didn't understand the question.

The Court: Where do you live?

Witness: 110 Edwin Avenue, Springfield Station, Panama City, Florida.

The Court: You have been called here as a witness by Clarence Earl Gideon, he would like to ask you some questions. You may inquire, Mr. Gideon.

Direct examination.

By the Defendant:

Q. Mrs. Morris, you are the owner of the Bay Harbor Hotel?

A. Yes, sir.

Q. I have been staying there for quite a while have I not?

A. Yes, you have stayed there for eight months, and you [fol. 54] stayed there off-and-on before that.

Q. Will you tell the Jury where the Bay Harbor Pool Room is with respect to your place of business?

A. The Bay Harbor Pool Room is across the Street from my business place.

Q. Was it uncommon for me to go across the street to the Pool Hall?

A. No, it was not uncommon at all, in fact, I think you worked there a while.

Q. On the morning of the commission of this crime was I there, had I been anywhere, or do you know?

A. What's that, now?

Q. On the morning this crime was committed, when the Bay Harbor Pool Room was broken into, did I go anywhere the night before?

A. Well, I think you went up at bed time, and went to bed. There wasn't too many in the hotel that night, I'm almost positive you went upstairs and went to bed. I know you went up, and I'm almost positive that you went to bed.

Q. Isn't it true, Mrs. Morris, that I don't ordinarily use the Telephone in the hotel when people are sleeping?

A. Yes, that's true. Most of the men are considerate of the sleepers in using the Telephone in the house.

Q. Is it not true that I went to the corner and used the Public Telephone when the guests are asleep in the hotel? [fol. 55] A. Yes, that is true. Most of the men did that, because it disturbs the sleepers, those who are asleep. I don't think you ever used the house 'phone at night.

Q. Do you know what time I got up that morning?

A. No, I wouldn't know that. I don't believe; you ordinarily got up about six-thirty or seven o'clock. I assume you got up about the same time that morning. I didn't

hear you get up during the early hours, or anything like that, if that's what you mean.

Q. Mrs. Morris, during the time I lived at the hotel did you ever know of me being out drunk?

A. No.

Q. Did you ever see me drunk?

A. No.

Q. Did you ever hear of me getting drunk?

A. No.

The Defendant: That's all.

The Court: Any questions by the State?

Mr. Harris: Yes, your Honor.

Cross-examination.

By Mr. Harris:

Q. Mrs. Morris, you don't know whether this man went [fol. 56] to bed at all that night do you?

A. Why yes, he went to bed, that is, he went upstairs. I saw him when he went up, I was sitting in the Lobby.

Q. What time was that?

A. About ten o'clock.

Q. Was that the last time you saw him?

A. Yes, that was the last time I saw him, when he went upstairs.

Q. He went upstairs?

A. Yes, he went upstairs.

Q. But you don't know whether he went to bed or not do you?

A. Why no, I don't know that. I know he went upstairs, I saw him go up, and I never heard him come down.

Mr. Harris: That's all.

This witness then left the stand.

Colloquy Between Court and Counsel.

The Court: Do you have any other witnesses, Mr. Gideon?

The Defendant: No, sir, that's all.

The Court: You are resting your case now?

The Defendant: Yes, your Honor.

[fol. 57] The Court: Do you wish to take the stand and tell the Jury your version of this case, Mr. Gideon? As I told you before, you are not required to take the witness stand, and it will not be held against you if you do not take it, but it is your privilege, and you may do so at this time if you desire to.

The Defendant: I don't care to take the witness stand, your Honor.

The Court: Allright, no one is going to insist on you taking the witness stand, it's your privilege to do as you like about it.

The Defendant: I don't care to take it.

The Court: Would you like to argue your side of this case to the Jury? Ordinarily, when a Defendant is not represented by Counsel the case is presented to the Jury on the testimony they have heard from the witness stand, but if you would like to argue this case you may do so.

The Defendant: I would like to argue the case to the Jury, your Honor.

The Court: Allright, just go over there and talk to the Jury, but you understand, do you, the difference between [fol. 58] an argument to a Jury and testifying under oath before a Jury?

The Defendant: Yes, sir.

The Court: I just wanted to make sure you understood the difference.

The Defendant: I do.

The Court: Allright, you may proceed.

Move around on the other side of the table where you will be close enough to see those Gentlemen, and let them see you, and talk loud and distinctly so they can understand what you say.

At this point the Defendant walked around the Counsel Table and stood facing the Jury, and talked to them for approximately eleven minutes, emphasizing his innocence to the charge contained in the Information filed in this case.

Mr. Harris, the Assistant State Attorney, then argued the State's case to the Jury for approximately nine minutes; after which came:

[fol. 59] THE CHARGE OF THE COURT

Gentlemen of the Jury, the Defendant, Clarence Earl Gideon, is on trial before you upon an Information charging him with Breaking and Entering with Intent to Commit a Misdemeanor. The Information was read to you at the beginning of the trial by the Assistant State Attorney. To this charge the Defendant has entered a plea of not guilty. The effect of such a plea places the burden of proof upon the State of Florida to prove this Defendant's guilt, and every material element constituting his guilt by evidence which will convince this Jury beyond a reasonable doubt that the charge is true and the Defendant is guilty.

The Defendant comes into Court with the presumption of innocence in his favor, he is presumed to be innocent of any offense until his guilt is established by the evidence in this case beyond a reasonable doubt; a reasonable doubt, however, is not a mere flimsy, shadowy doubt, amounting to the bare possibility that the Defendant is innocent, but it is such a substantial doubt in your minds, arising out of the evidence in this case, that after you have heard the testimony of the witnesses, and given the testimony of each witness full and fair consideration, then, if, upon consideration of the whole testimony you cannot say that you have an abiding conviction to a moral certainty of the truth [fol. 60] of this charge you would have a reasonable doubt, otherwise, you would have no reasonable doubt within the meaning of the law.

You, Gentlemen of the Jury, are the sole judges of the evidence, of the weight of the evidence and of the credibility of the witnesses, and in weighing the testimony of a witness, and passing upon his or her credibility, you may take into consideration the manner and demeanor of the witness upon the stand, his or her means and opportunity for knowing the things about which they testified; the reasonableness and probability of the testimony being true, the interest or lack of interest of the witness in the outcome of the case, and to all those things just apply your common knowledge of men and affairs in everyday life. In other words, just use the same sound judgment and common sense in arriving at your verdict in this case that you would use in your everyday affairs.

If there are conflicts in the testimony it is your duty to reconcile those conflicts so as to make all of the witnesses speak the truth, if you can reasonably do so; if however, you cannot so reconcile the testimony then you may discard from your consideration any and all testimony you deem unworthy of belief and base your verdict solely upon that testimony you believe to be true, because you, Gentlemen, have the right and the duty to say who is and who is not speaking the truth in this case.

I further charge you, Gentlemen of the Jury, that the [fol. 61] fact that the Defendant did not take the witness stand and testify in his own defense is not to be considered by you. There is no law that requires a Defendant to testify if they prefer not to, and the fact that this Defendant did not take the witness stand is not to be held against him by you in considering your verdict.

There are certain material elements in this case that the State of Florida must prove:

The first one is that the crime, if any, was committed in Bay County, Florida.

The second one is that it was committed within two years prior to the filing of this Information, which was filed on June 19, 1961.

The third one is that this Defendant, Clarence Earl Gideon, is the person who committed the crime.

To sum that up for you, if you should find from the evidence that Clarence Earl Gideon did, in Bay County, Florida, at any time within two years prior to the filing of the Information in this case, on June 19, 1961, unlawfully and feloniously break and enter the building of another, to wit, the Bay Harbor Pool Room, the property of Ira Strickland, Jr., the Lessee, within intent to commit a misdemeanor in said building, to wit, Petit Larceny, then, it would be your duty to return a verdict of guilty as charged.

If, however, you fail to find this state of facts, or after [fol. 62] full and fair consideration of all of the testimony in this case you have a reasonable doubt, as defined to you by the Court, then, it would be your duty to give the Defendant the benefit of that reasonable doubt and return a verdict of not guilty.

If you should find the Defendant guilty the form of your

verdict would be, We, the Jury, find the Defendant Guilty as charged. So say we all. And one of your number would sign that verdict as Foreman.

If you should find the Defendant not guilty, the form of your verdict would be, We, the Jury, find the Defendant not guilty. So say we all. And one of your number would sign that verdict as Foreman.

Any verdict reached by you must be concurred in by all of your number, and must be signed by one of your number as Foreman.

You may take the case, Gentlemen, and render your verdict.

[fol. 63] Reporter's Certificate (omitted in Printing)

[fol. 64] Filed October 11, 1961, Guyte P. McCord

31,116

Motions

Monday, October 16, 1961, Not To Be Heard

Division of Corrections

Correspondence Regulations

Mail Will Not Be Delivered Which Does Not Conform with These Rules

No. 1—Only 2 letters each week, not to exceed 2 sheets letter-size 8½ x 11" and written *on one side only*, and if ruled paper, do not write between lines. *Your complete name* must be signed at the close of your letter. *Clippings, stamps, letters* from other people, *stationery* or *cash must not be enclosed* in your letters.

No. 2—All *letters* must be addressed in the *complete prison name* of the inmate. *Cell number*, where applicable, and *prison number* must be placed in lower left corner of

envelope, with your complete name and address in the upper left corner.

No. 3 *Do not send any packages without a Package Permit.* Unauthorized *packages* will be destroyed.

No. 4 *Letters* must be written in English only.

No. 5 *Books, magazines, pamphlets,* and *newspapers* of reputable character will be delivered *only if* mailed direct from the publisher.

No. 6 *Money* must be sent in the form of *Postal Money Orders* only, in the inmate's complete prison name and prison number.

Institution: State Penitentiary, Raiford, Fla.
Cell Number: D 9.
Name: Clarence Earl Gideon.
Number: 003826

SUPREME COURT, STATE OF FLORIDA

PETITION FOR WRIT OF HABEAS CORPUS Filed: Oct. 11, 1961

Deny

1. I, Clarence Earl Gideon, inform this court that I am a pauper without funds or any possibilty of obtaining financial aid and I beg of this court to listen and act upon my plea.

2. On the 3rd day of June, 1961 A.D. I was arrested and charged with the crime of breaking and entering with the intent to commit a misdemeanor, to wit, petty larceny, and that I plead not guilty to this charge. That on the 4th day of August 1961 A.D. I was tried in court of Bay County, the 14th District Court in and for the State of Florida, and was found guilty as charged. That on the 25th day of August 1961 A.D. was sentenced to a term of five years (5 yrs.) in the State Prison.

[fol. 65] 3. I, Clarence Earl Gideon, will show this court that I did not have a fair trial and was denied my constitutional rights that is guaranteed by the Constitution and the Bill of Rights by the United States Government.

4. I was without funds and without an attorney. I asked this court to appoint me an attorney but they denied me that right. I told this court of the 14th District of

Florida, County of Bay, that United States Supreme Court of the United States of America had ruled that the State of Florida should see that everyone who is tried for a felony charge should have legal counsel. But the court ignored this plea.

5. I, Clarence Earl Gideon, claim that I was denied the rights of the 4th, 5th and 14th amendments of the Bill of Rights.

6. I sent a petition from the county jail of Bay County to the United States District Court at Tallahassee, Florida. But the sheriff's office and officials refuse to let it go out which is contrary to the laws of the United States Government.

[fol. 66] 7. I, Clarence Earl Gideon, beg of this court to issue a Writ of Habeas Corpus and to set aside the 5 year sentence that I have by the Court of Bay County, 14th District in and for the State of Florida, and to give me the aid that I need.

Signed: Clarence Earl Gideon.

STATE OF FLORIDA,
County of Union:

Subscribed and sworn to before me, a Notary Public, this 9th day of October, A.D., 1961.

Lawrence — —, Notary Public.

Notary Public, State of Florida at Large.

My commission Expires Sept. 19, 1962.

Bonded by American Surety Co. of N. Y.

[fol. 67] In the Supreme Court of Florida, July Term, A. D. 1961

Clarence Earl Gideon, Petitioner,

vs.

H. G. Cochran, Jr., Director, Division of Corrections, Respondent.

Order Denying Petition for Writ of Habeas Corpus
October 30, 1961

The above-named petitioner has filed a petition for writ of habeas corpus in the above cause, and upon consideration thereof, it is ordered that said petition be and the same is hereby denied.

[fol. 68] Clerk's Certificate (omitted in printing).

[fol. 69] Supreme Court of the United States, October Term, 1961

No. 890 Misc.

Clarence Earl Gideon, Petitioner,

vs.

H. G. Cochran, Jr., Director, Division of Corrections, Respondent.

Order Granting Motion for Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari—June 4, 1962.

On Petition for Writ of Certiorari to the Supreme Court of the State of Florida.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be,

and the same is hereby, granted. The case is transferred to the appellate docket as No. 1011. In addition to other questions presented by this case, counsel are requested to discuss the following in their briefs and oral argument:

"Should this Court's holding in Betts v. Brady, 316 U.S. 455, be reconsidered?"

June 4, 1962.

Mr. Justice Frankfurter took no part in the consideration or decision of this application.

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Office Supreme Court, U.S.
FILED
OCT 25 19
JOHN F. DAV

No. 155

In the Supreme Court of the United States

OCTOBER TERM, 1962

CLARENCE EARL GIDEON,

Petitioner,

vs.

H. G. COCHRAN, JR., Director, Division of Corrections,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Florida

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BRIEF FOR THE STATE OF OREGON AS AMICUS CURIAE

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State of Oregon

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Assistant Attorney General
State of Oregon
Supreme Court Building
Salem, Oregon

AMICUS CURIAE BRIEF

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No. 155

In the Supreme Court of the United States

OCTOBER TERM, 1962

CLARENCE EARL GIDEON,

Petitioner,

vs.

H. G. COCHRAN, JR., Director, Division of Corrections,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Florida

BRIEF FOR THE STATE OF OREGON AS AMICUS CURIAE

AMICUS CURIAE BRIEF

STATEMENT

Pursuant to order of this Court entered in this case on June 4, 1962, counsel are requested to discuss the following question:

" ' "Should this Court's holding in *Betts v. Brady*, 316 U.S. 455, be reconsidered?" ' "

Under Rule 27, and after specific suggestion of counsel for respondent, this brief of the State of Oregon, sponsored by its Attorney General, is submitted amicus

curiae. The sole purpose of this brief is to present to the Supreme Court the possibly unique preliminary findings and conclusions drawn from this state's experience under its recent Post-Conviction Relief Act [Oregon Laws 1959, chapter 636, Oregon Revised Statutes §§ 138.510–138.680 and 34.300 (1959)].[1] It is not our intent to state final conclusions on whether the Sixth Amendment of the United States Constitution is or is not applicable to practice and procedure in the various states under the Fourteenth Amendment to the United States Constitution. Nor do we urge a position on whether requirements of the Fourteenth Amendment require counsel in every felony case.

OBSERVATIONS CONCERNING OREGON'S POST-CONVICTION RELIEF ACT

Effective May 26, 1959, the Oregon State Legislature passed a Post-Conviction Relief Act to allow "some clearly defined method by which [state prisoners] may raise claims of denial of federal rights."[2] In specific reference to right to counsel problems, as met by the Oregon Post-Conviction Relief Act, a committee of the Judicial Council of the State of Oregon, in a report signed

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[1] Reprinted in Appendix A.

[2] *Young v. Ragen*, 337 US 235, 239 (1948) as quoted in an article on the "Oregon Postconviction-Hearing Act", 39 Oregon Law Review 337, June 1960.

by five leading Oregon judges,[3] concluded that "the best answer to the problem would be to appoint an attorney in every felony case whether the defendant wants it or not."[4] In a preliminary discussion of the Post-Conviction Relief Act, this committee commented that "a major area of concern must be the cost of these proceedings." In an addenda to the report, the committee attached a partial cost calculation showing a cost to the various counties of the state of $38,000, for the first 20 months' period of the program.

The office of the Attorney General estimated that the total cost of the Pos -Conviction Relief program exceeds $100,000 a year.[5] In a summary, Charles A. Sprague, former Governor of the State of Oregon, in his column "It Seems to Me" stated that:

> "This new law which opens up the way for trials of cases means heavy additional costs to the state. It invites every man who enters the penitentiary to become a jailhouse lawyer, seeking some angle on which he can hang a plea for a fresh hearing. And after the hearing, of course, he still has the right of appeal to the Supreme Court. The procedure consumes time of courts, of the Attorney General's office, which has the responsibility in this connection,

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[3] Oregon Supreme Court Justice Gordon W. Sloan and Circuit Judges Alan F. Davis, George A. Jones, Val D. Sloper and Lyle R. Wolff.

[4] Report of Judicial Council Committee on Arraignment, Procedure and Waiver of Rights to the Oregon Judicial Council, 1962.

[5] Oregon Statesman, January 19, 1962.

and of local authorities who will be called on for aid or evidence."[5b]

The case of *Bloor v. Gladden*, 227 Or 600, 363 P2d 57 (1961), as supplemented by the case of *State v. Bloor*, 229 Or 49, 365 P2d 103, 365 P2d 1075, is the leading case on right to counsel, as tested in an Oregon post-conviction hearing. That case upheld the action of an Oregon circuit court judge in not furnishing counsel to an accused, who was considered to have waived such right.

Also, in a currently unpublished United States District Court opinion, Judge East of the United States District Court for the District of Oregon (*Cannon v. Gladden*, Case No. 61-282, March 28, 1962) upheld the validity of another Oregon case in which the court, in rather extreme circumstances, accepted the waiver of counsel by an accused.[6]

Thus, Oregon's Post-Conviction Relief Act has not materially changed the legal pattern previously set, so far as the question of right to counsel and the waiver thereof are concerned.

Some recent statistics, drawn from the first three years of the Post-Conviction Relief Act (the three years from June 1, 1959 to June 1, 1962) are applicable to the question of availability of counsel. Of 175[7a] Post-Convic-

[5b] Oregon Statesman, February 28, 1962.
[6] Opinion reported in Appendix B.
[7a] Excluding some special cases not pertinent here.

tion Relief Act cases terminated in that period, 20[b] were found to contain substantial defect in conviction or sentence requiring relief to be afforded.[c] In 15 of these cases, no attorney had represented the accused at the time the defect occurred.

Eight of these 20 substantial defect cases resulted in a final release from Oregon custody. In every such instance of final release, there had been no attorney at the crucial point in the original criminal proceeding.

In each of the five substantial defect cases in which an attorney represented the defendant, the defect was in the sentence, not in the conviction. Thus, in none of these five cases did the defect lead to a final release. In four of the five, a resentence has already been effected, and in the fifth a resentence is considered to be pending, the defendant serving several concurrent sentences.

While these statistics are certainly not conclusive, and it is clear that further analysis in depth would be required to fully utilize the experimental and information values of the past three years' experience in the Post-Conviction Relief Act, it may nevertheless be concluded that the money so expended would better have been expended in pressing counsel on all defendants, whether desired or not.

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[b] Excluding some special cases not pertinent here.

[c] Cases listed in Appendix C.

CONCLUSION

The conclusion expressed in this brief is simply that the experience of the State of Oregon tends to indicate that it would provide greater protection of constitutional rights, and would be less expensive, to insist upon counsel in each original criminal proceeding; than to attempt by a post-conviction proceeding to recover justice, lost by defects at the trial.

Respectfully submitted,

ROBERT Y. THORNTON
Attorney General of Oregon

HAROLD W. ADAMS
Assistant Attorney General
Amicus Curiae

APPENDIX A

Oregon Revised Statutes 138.510 to 138.680

POST-CONVICTION RELIEF ACT

138.510 Convicted person may file petition for relief. (1) Except as otherwise provided in ORS 138.540, any person convicted of a crime under the laws of this state may file a petition for post-conviction relief pursuant to ORS 138.510 to 138.680.

(2) A petition pursuant to ORS 138.510 to 138.680 may be filed without limit in time.

(3) The remedy created by ORS 138.510 to 138.680 is available to persons convicted before May 26, 1959.

(4) In any post-conviction proceeding pending in the courts of this state on May 26, 1959, the person seeking relief in such proceedings shall be allowed to amend his action and seek relief under ORS 138.510 to 138.680. If such person does not choose to amend his action in this manner, the law existing prior to May 26, 1959 shall govern his case.

[1959 c.636 §§1, 17, 16]

138.520 Relief which court may grant. The relief which a court may grant or order under ORS 138.510 to 138.680 shall include release, new trial, modification of sentence, and such other relief as may be proper and just. The court may also make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody and bail.

[1959 c.636 §2]

138.530 When relief must be granted; executive

clemency or pardon powers and original jurisdiction of Supreme Court in habeas corpus not affected. (1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.

(c) Sentence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or unconstitutionality of such sentence.

(d) Unconstitutionality of the statute making criminal the acts for which petitioner was convicted.

(2) Whenever a person petitions for relief under ORS 138.510 to 138.680, ORS 138.510 to 138.680 shall not be construed to deny relief where such relief would have been available prior to May 26, 1959, under the writ of habeas corpus, nor shall it be construed to affect any powers of executive clemency or pardon provided by law.

(3) ORS 138.510 to 138.680 shall not be construed to limit the original jurisdiction of the Supreme Court

in habeas corpus as provided in the Constitution of this state.

[1959 c.636 §3.5]

138.540 Petition for relief as exclusive remedy for challenging conviction; when petition may not be filed; abolition or availability of other remedies. (1) Except as otherwise provided in ORS 138.510 to 138.680, a petition pursuant to ORS 138.510 to 138.680 shall be the exclusive means, after judgment rendered upon a conviction for a crime, for challenging the lawfulness of such judgment or the proceedings upon which it is based. The remedy created by ORS 138.510 to 138.680 does not replace or supersede the motion for new trial, the motion in arrest of judgment or direct appellate review of the sentence or conviction, and a petition for relief under ORS 138.510 to 138.680 shall not be filed while such motions or appellate review remain available. With the exception of habeas corpus, all common law post-conviction remedies, including the motion to correct the record, coram nobis, the motion for relief in the nature of coram nobis and the motion to vacate the judgment, are abolished in criminal cases.

(2) When a person restrained by virtue of a judgment upon a conviction of crime asserts the illegality of his restraint upon grounds other than the unlawfulness of such judgment or the proceedings upon which it is based or in the appellate review thereof, relief shall not be available under ORS 138.510 to 138.680 but shall be sought by habeas corpus or other remedies, if any, as

otherwise provided by law. As used in this subsection, such other grounds include but are not limited to unlawful revocation of parole or conditional pardon or completed service of the sentence imposed.
[1959 c.636 §4]

138.550 Availability of relief as affected by prior judicial proceedings. The effect of prior judicial proceedings concerning the conviction of petitioner which is challenged in his petition shall be as specified in this section and not otherwise:

(1) The failure of petitioner to have sought appellate review of his conviction, or to have raised matters alleged in his petition at his trial, shall not affect the availability of relief under ORS 138.510 to 138.680. But no proceeding under ORS 138.510 to 138.680 shall be pursued while direct appellate review of his conviction, a motion for new trial, or a motion in arrest of judgment remains available.

(2) When the petitioner sought and obtained direct appellate review of his conviction and sentence, no ground for relief may be asserted by petitioner in a petition for relief under ORS 138.510 to 138.680 unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding. If petitioner was not represented by counsel in the direct appellate review proceeding, due to his lack of funds to retain such counsel and the failure of the court to appoint counsel for that proceeding, any ground for relief under ORS 138.510 to 138.680 which was not spe-

cifically decided by the appellate court may be asser
in the first petition for relief under ORS 138.510
138.680, unless otherwise provided in this section.

(3) All grounds for relief claimed by petitioner
a petition pursuant to ORS 138.510 to 138.680 must
asserted in his original or amended petition, and a
grounds not so asserted are deemed waived unless
court on hearing a subsequent petition finds grou
for relief asserted therein which could not reasona
have been raised in the original or amended petit
However, any prior petition or amended petition wh
was withdrawn prior to the entry of judgment by le
of the court, as provided in ORS 138.610, shall have
effect on petitioner's right to bring a subsequent petit

(4) Except as otherwise provided in this subsect
no ground for relief under ORS 138.510 to 138.6
claimed by petitioner may be asserted when such grou
has been asserted in any post-conviction proceeding pr
to May 26, 1959, and relief was denied by the court,
when such ground could reasonably have been asser
in the prior proceeding. However, if petitioner was
represented by counsel in such prior proceeding, a
ground for relief under ORS 138.510 to 138.680 wh
was not specifically decided in the prior proceedi
may be raised in a first petition for relief pursuant
ORS 138.510 to 138.680. Petitioner's assertion, in a po
conviction proceeding prior to May 26, 1959, of a grou
for relief under ORS 138.510 to 138.680, and the decisi
of the court in such proceeding adverse to the petition
shall not prevent the assertion of the same ground

the first petition pursuant to ORS 138.510 to 138.680 if the prior adverse decision was on the ground that no remedy heretofore existing allowed relief upon the grounds alleged, or if the decision rested upon the inability of the petitioner to allege and prove matters contradicting the record of the trial which resulted in his conviction and sentence.

[1959 c.636 §15]

138.560 Procedure upon filing petition for relief; venue and transfer of proceedings. (1) A proceeding for post-conviction relief pursuant to ORS 138.510 to 138.680 shall be commenced by filing a petition and two copies thereof with the clerk of the circuit court for the county in which the petitioner is imprisoned or, if the petitioner is not imprisoned, with the clerk of the circuit court for the county in which his conviction and sentence was rendered. The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of such court. A copy of the petition need not be served by petitioner on the defendant, but, in lieu thereof, the clerk of the court in which the petition is filed shall immediately forward by registered mail a copy of the petition to the Attorney General or other attorney for the defendant named in ORS 138.570.

(2) For the purposes of ORS 138.510 to 138.680, a person released on parole or conditional pardon shall be deemed to be imprisoned in the institution from which he is so released.

(3) Except when petitioner's conviction was for a

misdemeanor. The release of the petitioner from imprisonment during the pendency of proceedings instituted by him pursuant to ORS 138.510 to 138.680 shall not cause the proceedings to become moot. Such release of petitioner shall not change the venue of the proceedings out of the circuit court in which they were commenced and shall not affect the power of such court to transfer the proceedings as provided in subsection (4) of this section.

(4) Whenever petitioner is imprisoned in the Oregon State Penitentiary or the Oregon State Correctional Institution and the circuit court for Marion County finds that the hearing upon the petition can be more expeditiously conducted in the county in which the petitioner was convicted and sentenced, the circuit court for Marion County upon its own motion or the motion of a party may order the petitioner's case to be transferred to the circuit court for the county in which petitioner's conviction and sentence were rendered. Such an order shall not be reviewable by any court of this state.

[1959 c.636 §6]

138.570 Defendant and counsel for defendant. If the petitioner is imprisoned, the petition shall name as defendant the official charged with the confinement of petitioner. If the petitioner is not imprisoned, the defendant shall be the State of Oregon. Whenever the defendant is the Warden of the Oregon State Penitentiary or the Superintendent of the Oregon State Correctional Institution, the Attorney General shall act as his attorney in the proceedings. Whenever the defendant is some other

official charged with the confinement of petitioner, the district attorney of the county wherein the petitioner is imprisoned shall be the attorney for the defendant. Whenever petitioner is not imprisoned, counsel for the State of Oregon as defendant shall be the district attorney of the county in which petitioner's conviction and sentence were rendered. Whenever the petitioner is released from imprisonment during the pendency of any proceedings pursuant to ORS 138.510 to 138.680, the State of Oregon shall be substituted as defendant. Upon such substitution, counsel for the original defendant shall continue to serve as counsel for the substituted defendant.

[1959 c.636 §7]

138.580 Petition. The petition shall be verified by the petitioner. Facts within the personal knowledge of the petitioner and the authenticity of all documents and exhibits included in or attached to the petition must be sworn to affirmatively as true and correct. The Supreme Court, by rule, may prescribe the form of such verification. The petition shall identify the proceedings in which petitioner was convicted and any appellate proceedings thereon, give the date of entry of judgment and sentence complained of and identify any previous post-conviction proceedings that the petitioner has undertaken to secure a post-conviction remedy, whether under ORS 138.510 to 138.680 or otherwise, and the disposition thereof. The petition shall set forth specifically the grounds upon which relief is claimed, and shall state clearly the relief

desired. All facts within the personal knowledge of the petitioner shall be set forth separately from the other allegations of fact and shall be verified as heretofore provided in this section. Affidavits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition, or the petition shall state why they are not attached. Argument, citations and discussion of authorities shall be omitted from the petition but may be submitted in a separate memorandum of law.

[1959 c.636 §8]

138.590 Petitioner may proceed as poor person. (1) Any petitioner who is unable to pay the expenses of a proceeding pursuant to ORS 138.510 to 138.680 or to employ counsel for such a proceeding may proceed as a poor person pursuant to this section upon order of the circuit court in which the petition is filed.

(2) If the petitioner wishes to proceed as a poor person, he shall file with his petition an affidavit stating that he is unable to pay the expenses of a proceeding pursuant to ORS 138.510 to 138.680 or to employ counsel for such a proceeding. The affidavit shall contain a brief statement of petitioner's assets and liabilities and his income during the previous year. If the circuit court is satisfied that petitioner is unable to pay such expenses or to employ counsel, it shall order that petitioner proceed as a poor person. However, when the circuit court for Marion County orders petitioner's case transferred to another circuit court as provided in subsection (4) of

ORS 138.560, the matter of petitioner's proceeding as a poor person shall be determined by the latter court.

(3) In the order to proceed as a poor person, the circuit court shall appoint counsel to represent petitioner. Counsel so appointed shall represent petitioner throughout the proceedings in the circuit court.

(4) If counsel appointed by the circuit court determines that the petition as filed by petitioner is defective, either in form or in substance, or both, he may move to amend the petition within 15 days following his appointment, or within such further period as the court may allow. Such amendment shall be permitted as of right at any time during this period. If appointed counsel believes that the original petition cannot be construed to state a ground for relief under ORS 138.510 to 138.680, and cannot be amended to state such a ground, he shall, in lieu of moving to amend the petition, inform the petitioner and notify the circuit court of his belief by filing an affidavit stating his belief and his reasons therefor with the clerk of the circuit court. This affidavit shall not constitute a ground for denying the petition prior to a hearing upon its sufficiency, but the circuit court may consider such affidavit in deciding upon the sufficiency of the petition at the hearing.

(5) When a petitioner has been ordered to proceed as a poor person, the expenses which are necessary for the proceedings upon his petition in the circuit court and the award to appointed counsel for petitioner as provided in this subsection shall be a charge against and shall be paid by the county in which petitioner's conviction and

sentence were rendered. At the conclusion of proceedings on a petition pursuant to ORS 138.510 to 138.680, the circuit court shall determine the amount of expenses of petitioner in the circuit court. The circuit court may also determine a reasonable fee for the services of appointed counsel in the proceedings in the circuit court. The expenses and fee determined by the circuit court shall be certified to and shall be ordered to be paid by the county in which petitioner's conviction and sentence were rendered and shall be paid by such county.

(6) When petitioner has been ordered to proceed as a poor person, all court fees in the circuit court are waived.

[1959 c.636 §9; 1961 c.480 §3]

138.600 Filing fee and undertaking not required. Notwithstanding any other fees provided by law, there shall be no filing fee or undertaking required in any court for a proceeding pursuant to ORS 138.510 to 138.680.

[1959 c.636 §10]

138.610 Pleadings. Within 30 days after the docketing of the petition, or within any further time the court may fix, the defendant shall respond by demurrer, answer or motion. No further pleadings shall be filed except as the court may order. The court may grant leave, at any time prior to entry of judgment, to withdraw the petition. The court may make appropriate orders as to the amendment of the petition or any other pleading, or as to the filing of further pleadings, or as to extending

the time of the filing of any pleading other than the original petition.

138.620 Hearing. (1) After the response of the defendant to the petition, the court shall proceed to a hearing on the issues raised. If the defendant's response is by demurrer or motion raising solely issues of law, the circuit court need not order that petitioner be present at such hearing, so long as petitioner is represented at the hearing by counsel. At the hearing upon issues raised by any other response, the circuit court shall order that petitioner be present.

(2) If the petition states a ground for relief, the court shall decide the issues raised and may receive proof by affidavits, depositions, oral testimony or other competent evidence. The burden of proof of facts alleged in the petition shall be upon the petitioner to establish such facts by a preponderance of the evidence.
[1959 c.636 §12]

138.630 Evidence of events occurring at trial of petitioner. In a proceeding pursuant to ORS 138.510 to 138.680, events occurring at the trial of petitioner may be shown by a duly authenticated transcript, record or portion thereof. If such transcript or record cannot be produced, the affidavit of the judge who presided at the trial setting forth the facts occurring at the trial shall be admissible in evidence when relevant. When necessary to establish any ground for relief specified in ORS 138.530, the petitioner may allege and prove matters in contradiction of the record of his trial. When the record

is so contradicted, the defendant may introduce in evidence any evidence which was admitted in evidence at the trial to support the contradicted matter and may call witnesses whose testimony at such trial supported the contradicted matter. Whenever such evidence or such witnesses cannot be produced by defendant for any reason which is sufficient in the opinion of the court, such parts of the duly authenticated record of the trial as support the contradicted matter may be introduced in evidence by the defendant. A duly authenticated record of the testimony of any witness at the trial may be introduced in evidence to impeach the credibility of any testimony by the same witness in the hearing upon the petition.

[1959 c.636 §13]

138.640 Judgment. After deciding the issues raised in the proceeding, the court shall deny the petition or enter an order granting the appropriate relief. The court may also make orders as provided in ORS 138.520. The order making final disposition of the petition shall state clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided. This order shall constitute a final judgment for purposes of appellate review and for purposes of res judicata.

[1959 c.636 §14]

138.650 Appeal. Either the petitioner or the defendant may appeal to the Supreme Court of Oregon within 60 days after the entry of final judgment on a petition

pursuant to ORS 138.510 to 138.680. The manner of taking the appeal and the scope of review by the Supreme Court shall be the same as that provided by law for appeals in criminal actions, except that the court may provide that the bill of exception contain only such evidence as may be material to the decision of the appeal. [1959 c.636 §18]

138.660 Dismissal of appeal. In reviewing the judgment of the circuit court in a proceeding pursuant to ORS 138.510 to 138.680, the Supreme Court on its own motion or on motion of respondent may, at any time after all papers and documents necessary or required by law for full appellate review have been filed with the clerk of the Supreme Court, dismiss the appeal without oral argument or submission of briefs if it finds that no substantial question of law is presented by the appeal. A dismissal of the appeal under this section shall constitute a decision upon the merits of the appeal. [1959 c.636 §19]

138.670 Admissibility, at new trial, of testimony of witness at first trial. In the event that a new trial is ordered as the relief granted in a proceeding pursuant to ORS 138.510 to 138.680, a properly authenticated transcript of testimony in the first trial may be introduced in evidence to supply the testimony of any witness at the first trial who has since died or who cannot be produced at the new trial for other sufficient cause. Such transcript shall not be admissible in any other respect, except that the transcript of testimony of a witness at the first

trial may be used at the new trial to impeach the
mony at the new trial by the same witness.
[1959 c.636 §20]

138.680 Short title. ORS 138.510 to 138.680 m
cited as the Post-Conviction Hearing Act.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN CALVIN CANNON, Petitioner, v. CLARENCE T. GLADDEN, Warden of the Oregon State Penitentiary, Respondent.	)	No. 61-282 OPINION March 28, 1962

EAST, District Judge.

The petitioner seeks a writ of habeas corpus commanding his release from custody by the respondent, pursuant to the judgment of sentence dated April 27, 1954; later referred to.

On January 21, 1954, petitioner was convicted of the crime of rape upon a girl of the age of 14 years, and on that date the Circuit Court of the State of Oregon for Deschutes County sentenced the petitioner to serve not to exceed 20 years in the Oregon State Penitentiary. Thereafter, on January 25, 1954, the same court set aside the judgment of conviction and requested the Superintendent of the Oregon State Hospital to appoint a psychiatrist to examine the petitioner and report to the court, all as provided and in compliance with ORS §§ 137.112 and 137.113. Thereafter, such appointment

and examination was made and the psychiatrist's report filed, and upon advice of the same to petitioner in open court on April 22, 1954, the petitioner "stated that he desired to discuss his case with an attorney" and was given leave time to consult with John M. Copenhaver, an attorney of Redmond, Oregon. On April 27, 1954, petitioner again appeared in open court, where the District Attorney reported that the petitioner had "decided that he did not wish to consult with an attorney regarding this case," whereupon the court asked petitioner "if it was his decision not to discuss his case with the attorney he had requested and he replied that it was" and he further "replied that he was" ready for further proceedings in the case. Whereupon, the court sentenced petitioner "to serve not to exceed twenty years in the Oregon State Penitentiary." Throughout the proceedings the petitioner, in open court, waived any presentence report or hearing.

The respondent has answered to an order of this Court to show cause why the requested writ should not issue.

Petitioner's two tenable grounds for relief are, briefly:

1) That the petitioner was deprived of his Constitutional right to the benefit of counsel; and

(2) That the Court abused its discretion in the proceedings by accepting petitioner's plea of guilty.

Petitioner in his brief states:

"* * * After the submission of the report by the state psychiatrist, the trial judge must have realized that the petitioner did not have the intelligence and

mental capacity at the time of the proceedings, to waive counsel, and counsel should have been appointed to advise petitioner prior to the sentencing on April 27, 1954, whether requested or not."

It appears from the record herein that heretofore the petitioner has had a full hearing in the Circuit Court of Oregon for Marion County upon his petition for a review of his sentence pursuant to the Oregon Post-Conviction Act § 138.510, 138.680, resulting adversely to petitioner. An appeal from this result to the Supreme Court was dismissed on November 28, 1960.

The psychiatrist's report herein states, *inter alia:*

"This man is quite dangerous to be at large. He is not at all responsible for his actions, but at the same time there is little, if anything that can be done either medically or psychiatrically to help him to become a stable individual. For his own protection and for the protection of society, he should be confined in an institution until such time as he can be deemed safe to be at large. Inasmuch as he cannot be 'cured' by medical or psychiatric means in the present state of our knowledge and would not benefit from treatment at a hospital for the mentally ill, it would seem best that he be confined in the penitentiary for the maximum time allowable under the statutes, with the proviso that if at any time it would seem indicated that medical or psychiatric care would be of help to him, that he be transferred to an institution for the care and treatment of mental and neurological disorders. It would be well to send along his medical history when he is sent to the penitentiary."

ORS § 137.111 provides:

"After the presentence hearing and upon the consideration of the psychiatric report required by ORS

137.112 to 137.116; the court may, in its discretion, in lieu of any other sentence authorized by law for such crime, sentence any person convicted under ORS 163.210, 163.220, 163.270, 167.035, 167.040 or 167.045 to an indeterminate term not exceeding the natural life of such person if:

"(1) The offense involved a child under the age of 16 years; and

"(2) The court finds that such person has a mental or emotional disturbance, deficiency or condition predisposing him to the commission of any crime punishable under ORS 163.210, 163.220, 163.270, 167.035, 167.040 or 167.045 to a degree rendering the person a menace to the health or safety of others."

It is self-evident from the sentence imposed that the court in its discretion did not elect to deal with the petitioner as a sexual psychopath but rather as an adult person duly convicted of the crime as charged in the information.

As to the court's discretion in these matters, see *State v. McDaniel*, 307 S.W.2d 42, 46 (Mo. Ct. App. 1957):

"We are unwilling to say that the trial court abused its discretion in ordering the defendant tried on the criminal charge. Even if the court had specifically found that the defendant was a sexual psychopath, nevertheless, it could order him tried criminally. This right of discretion partakes of the same right of discretion to parole a person after conviction. We know of no case in which an appellate court has held that a trial court's discretion to parole had been abused."

See, also, *Wilson v. State*, 139 N.E.2d 554, at 557, 236 Ind. 278 (1957):

"* * * It is true that both medical experts stated that, in their opinion, appellant is a criminal sexual

psychopathic person, within the meaning of the law. However, the court was not bound by the conclusion of the medical experts. It was his right and duty to consider both the facts and the reasoning upon which these experts based their conclusions and to arrive at his own conclusion as to the physical condition and the legal status of the appellant. This conclusion involves two considerations, (1) the statutory definition of a 'criminal sexual psychopathic person' and (2) the facts in evidence regarding appellant's condition. * * *"

Next, dealing with petitioner's argument that the court in view of the psychiatrist's report acted arbitrarily in not finding petitioner incompetent, accepting petitioner's statement that he did not desire to be represented by counsel, and in allowing entry of his plea of guilty.

It is most difficult for a trial court to determine just when or when not to accept a defendant at his word as to his refusal of counsel. It is a matter that should be and is left to the judicious discretion of the court who has the "feel of the situation" in its hands. ORS §§ 136.150 and 136.410, respectively, read:

"*Mental condition at time of trial.* If before or during the trial in any criminal case the court has reasonable ground to believe that the defendant, against whom an indictment has been found or an information filed, is insane or mentally defective to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The court may appoint one or more disinterested qualified experts to examine the defendant with regard to his present

mental condition and to testify at the hearing. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

"*Morbid propensity to commit prohibited act as a defense.* A morbid propensity to commit a prohibited act, existing in the mind of a person who is shown to have been responsible for knowing the wrongfulness of the act, is not admissible as a defense to a prosecution for committing the act."

State v. Nelson, 162 Ore. 430, 441 (1939), defines

"Whether there were reasonable grounds to believe that the defendant was insane under chapter 2[illegible] Oregon Laws 1957 [illegible] ORS 136.410, was a question for the discretion of the trial court. *State v. Peterson*, 90 Wash. 479, 156 P. 542; *People v. Mc Elvaine*, 125 N.Y. 596, 26 N.E. 929; *State v. Starr*, 114 Or. 227, 226 P. 430, 16 C.J. 789, 790, 201. There was no abuse of discretion on the part of the trial court to refuse to have a further hearing under the circumstances.

So, I find here that there is no showing that in view of the psychiatric report the court was capricious, arbitrarily indifferent toward petitioner's Constitutional rights in its taking petitioner at his word. The trial court's discretion in letting petitioner's plea of guilty stand and taking petitioner at his word that he did not desire counsel cannot be disturbed.

Counsel for respondent is requested to submit appropriate order of dismissal of petitioner's petition at cause.

DATED March 28, 1962.

APPENDIX C

DATE OF ORDER GRANTING RELIEF	NAME (ALL CASES vs. GLADDEN	DEFECT FOUND	REPRESENTED BY ATTORNEY AT CRIMINAL TRIAL	FINAL RESULT OF POST-CONVICTION
1959				
Sept. 9	Falconer, John M.	Prosecution Under Wrong Statute	No	Released
Oct. 2	Young, Clarence E.	Excessive ~~Statute~~ Sentence	No	Released
Nov. 13	Roach, William O.	Faulty Sentence Procedure	Yes	Resentenced
Dec. 17	Marshall, James F.	Faulty Sentence Procedure	No	Released
1960				
Feb. 4	Nelson, George	Incompetent Waiver	No	Resentenced
Apr. 7	Kirchmeyer, John W.	Incompetent Waiver	No	Resentenced
Apr. 20	Crow, Delbert Lee	Faulty Sentence Procedure	No	Released

DATE OF ORDER GRANTING RELIEF	NAME (ALL CASES vs. GLADDEN	DEFECT FOUND	REPRESENTED BY ATTORNEY AT CRIMINAL TRIAL	FINAL RESULT OF POST-CONVICTION
July 5	Gilman, Donald M.	Faulty Sentence Procedure	No	Released
Aug. 6	Pye, Robert V.	Faulty Probation Revocation	No	Released
Sept. 30	Bloor, William P.	Faulty Sentence Procedure	No	Resentenced
Oct. 27	Williams, Richard E.	Incompetent Waiver	No	Resentenced
Dec. 5	Porter, Earl Robert	Faulty Probation Revocation	No	Released
1961				
Jan. 12	Eubanks, Harvey	Excessive Sentence	Yes	Resentenced

APPENDIX C—Continued

DATE OF ORDER GRANTING RELIEF	NAME (ALL CASES–vs. GLADDEN	DEFECT FOUND	REPRESENTED BY ATTORNEY AT CRIMINAL TRIAL	FINAL RESULT OF POST-CONVICTION
Aug. 25	Gidley, James W. S.	Faulty Sentence Procedure	No	Resentenced
Oct. 6	Symons, Harry D.	Excessive Sentence	No	Released
1962				
Jan. 5	Founts, Eugene	Excessive Sentence	Yes	Resentenced
Feb. 1	Froembling, Harvey R.	Excessive Sentence	Yes	Resentenced (Pending)
Feb. 2	Watson, Ernest C.	Faulty Sentence Procedure	No	Resentenced
Feb. 3	Watters, Marion S.	Excessive Sentence	Yes	Resentenced
Feb. 22	Holland, Paul C.	Faulty Sentence Procedure	No	Resentenced

No. 153

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DAVIS CLERK

IN THE

Supreme Court of the United States

October Term, 1962

CLARENCE EARL GIDEON, *Petitioner*,

v.

H. G. COCHRAN, JR., Director
Division of Corrections, *Respondent*.

On Writ of Certiorari to the Supreme Court of
The State of Florida

BRIEF FOR THE PETITIONER

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A.B.A., Section of Criminal Law, *A Comparative Study of Criminal Law Administration in the United States and Great Britain*, 50 J. Crim. L., C. & P.S. 59 (1959) 20
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Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 De Paul L. Rev. 213 (1958) 17, 26
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Beeker and Heidelbaugh, *The Right to Counsel in Criminal Cases—An Inquiry Into the History and Practice in England and America*, 28 Notre Dame Law. 354 (1953) 28

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IV *Blackstone's Commentaries* 348-350 (Clarendon Press 1767) 21

Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. Rev. 761 (1961) 17

Brownell, *Legal Aid in the United States*, 1961 Suppl. 14 (1961) 32

Comment, *Preliminary Hearings on Indictable Offenses in Philadelphia*, 106 U. Pa. L. Rev. 589 (1958) 18, 27

108 Cong. Rec. 21079 (Oct. 4, 1962) 34

Dash, *Cracks in the Foundation of Justice*, 46 Ill. L. Rev. 385 (1951) 14

Devlin, *The Criminal Prosecution in England* 127 (1958) 20

Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L. J. 1 (1960) 25

Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917 (1926) 44

Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L. J. 1149 (1960) 27

Griswold and Cohen, New York Times, Aug. 2, 1942, § IV, p. 6, col. 5 46

Hall and Glueck, *Cases on Criminal Law and Its Enforcement* 604 (1958) 45

Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y. L. Q. Rev. 1 (1944) 19

Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803 (1961) 16

Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on 'The Most Pervasive Right' of an Accused*, 30 U. of Chi. L. Rev. 1 (1962) 30, 31

Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* (1956) 20

Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. Crim. L., C. & P.S. 780 (1956) 14, 27

Note, *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693 (1958) 15

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Note, *Bail: An Ancient Practice Re-examined*, 70 Yale L.J. 966 (1961) 15
Note, *Metropolitan Criminal Courts at First Instance*, 70 Harv. L. Rev. 320 (1956) 16
Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. Pa. L. Rev. 1031 (1954) 15
The Oxford Dictionary of English Proverbs 112 (2d ed. 1948) 14
Pollock, *Equal Justice in Practice*, 45 Minn. L. Rev. 737 (1961) 16
Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461 (1960) 33
Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1 (1956) 17, 28
S. 2900, 87th Cong., 2d Sess. 34
Sen. Judiciary Committee, Subcommittee on Constitutional Rights, *Legal Counsel for Indigent Defendants in Federal Courts*, p. 9 (1961) 31
5 The Speeches of the Right Hon. Charles James Fox in the House of Commons (London 1815) 18
Summary of Conference Proceeding of the National Legal Aid and Defender Ass'n, 9 (1959) 32
Symposium, *The Right to Counsel*, 45 Minn. L. Rev. 693-896 (1961) 32
Waddington, *The Development of Legal Aid in England Since 1949*, 48 A.B.A. J. 1029 (1962) 20
Willcox and Blumstein, *Account of a Field Study in a Rural Area of the Representation of Indigents Accused of Crime*, 59 Colum. L. Rev. 551 (1959) 16
Willcox and Blumstein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 Cornell L. Q. 1 (1957) 26

IN THE

Supreme Court of the United States

October Term, 1962

No. 155

CLARENCE EARL GIDEON, *Petitioner*,

v.

H. G. COCHRAN, JR., Director,
Division of Corrections, *Respondent*.

On Writ of Certiorari to the Supreme Court of The State of Florida

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BRIEF FOR THE PETITIONER

SUMMARY STATEMENT OF THE CASE

Petitioner, Clarence Earl Gideon, was charged by an information filed in the Circuit Court of Bay County, Florida, with a felony defined as "unlawfully and feloniously break[ing] and enter[ing] a building of another, to wit, The Bay Harbor Poolroom . . . with intent to commit a misdemeanor within said building, to

wit: petit larceny . . ." (R. 1). This offense is punishable under Florida law by a sentence of not more than five years imprisonment or a fine not to exceed $500. Fla. Stat. §810.05 (1961). Appendix A, *infra*. Petitioner pleaded not guilty (R. 3).[1]

At the commencement of the trial, Petitioner informed the trial judge that he was "not ready" because "I have no counsel." (R. 8-9). Petitioner expressly requested that counsel be appointed to assist him at the trial, but the request was denied by the trial court. The colloquy is as follows (R. 9):

> "The Defendant: Your Honor, I said: I request this Court to appoint Counsel to represent me in this trial.
>
> "The Court: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a

[1] The record shows that the arraignment was postponed when Petitioner "requested permission to consult counsel" (R. 2). The record does not indicate, however, whether Petitioner obtained legal assistance at that point in the proceeding.

[2] It is conceded that Petitioner was an indigent person without funds to employ an attorney. In a memorandum filed in this Court in connection with a motion to strike portions of the record designated for printing, Respondent stated as follows:

> "Respondent hereby admits and concedes, for purposes of this case, that all allegations in the habeas corpus petition are true, including petitioner's allegations that he was without funds and without an attorney at the time of trial and that the trial court failed to appoint counsel upon his request." (*Respondent's Motion to Strike Paragraphs 1 and 2 of Petitioner's Designation for Printing*, p. 2).

capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

"The Defendant: The United States Supreme Court says I am entitled to be represented by Counsel.

"The Court: (Addressing the Reporter) Let the record show that the Defendant has asked the Court to appoint Counsel to represent him in this trial and the Court denied the request, and informed the Defendant that the only time the Court could appoint Counsel to represent a Defendant was in cases where the Defendant was charged with a capital offense. The Defendant stated to the Court that the United States Supreme Court said he was entitled to it."

A jury of six persons was then impaneled and the case proceeded to trial. Gideon represented himself. He directly examined several witnesses called in his behalf; he cross-examined the state's witnesses; and he made a closing argument. He was found guilty by the jury (R. 4). On August 25, 1961, Gideon was sentenced to five years imprisonment, the maximum penalty under the applicable statute (R. 5). He is presently confined in the state penitentiary at Raiford, Florida (R. 45).

On October 11, 1961, Gideon filed a sworn, handwritten petition for a writ of habeas corpus in the Florida Supreme Court, alleging that he "was without

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[3] See *Johnson* v. *Mayo*, 158 Fla. 264, 28 So. 2d 585 (1946), *cert. denied*, 329 U.S. 804 (1947); *Sneed* v. *Mayo*, 66 So. 2d 866, 872 (1953), *habeas corpus proceeding dismissed*, 80 So. 2d 653 (Fla. 1954); Fla. Stats. § 909.21 (1961), Appendix A, *infra*. But see note 27, *infra*.

funds and without an attorney," that he had asked the trial court "to appoint me an attorney but they denied me that right" and "ignored this plea," and that this action by the trial court denied him "the rights of the 4th, 5th and 14th Amendments of the Bill of Rights" (R. 45-46). The petition did not recite any "special circumstances" to show that the trial was unfair in the absence of counsel, nor did Petitioner allege that he was unable to defend himself by reason of any special circumstances or conditions. Gideon alleged that, under decisions of this Court, "the State of Florida should see that everyone who is tried for a felony charge should have legal counsel" (R. 46).

The Clerk of the Florida Supreme Court has certified to this Court that "no pleadings, transcripts, documents or papers" were before that Court other than the handwritten petition for habeas corpus which Gideon transmitted to the Florida Supreme Court from the state penitentiary.[2] The petition in this Court, like that in the Supreme Court of Florida, is based upon a claim of right to counsel. It does not allege any "special circumstances" in the present case requiring the appointment of counsel.

The petition for habeas corpus was denied by the Florida Supreme Court without requiring a return, without a hearing, and without opinion (R. 47).

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[1] Certificate of Ghyte P. McCord, Clerk, Supreme Court of Florida, attached to *Respondent's Motion to Strike Paragraphs 1 and 2 of Petitioner's Designation for Printing*.

[2] Similar procedure was followed by the Florida Supreme Court in *Reynolds v. Cochran*, 365 U.S. 525 (1961), in which this Court held that Petitioner was deprived of due process because of the trial

Thereafter, on January 8, 1962, Petitioner filed a motion in this Court for leave to proceed *in forma pauperis* and a petition for certiorari. On June 4, 1962, this Court entered an order in the present case granting the motion for leave to proceed *in forma pauperis* and granting the petition for certiorari. R. 47-48.[1] In the order granting the writ, the Court requested counsel "to discuss the following in their briefs and oral argument: 'Should this Court's holding in *Betts v. Brady*, 316 U.S. 455, be reconsidered?'" R. 47-48.

At the request of counsel for Petitioner herein, the trial court proceedings were not filed directly in this Court by the clerk of the trial court after the petition for certiorari was granted. The Florida Attorney General takes the position in this Court that the transcript of the trial proceedings should not be considered by this Court in deciding the present case because it was not before the Florida Supreme Court. *Op. cit.* note 2, *supra*. We do not agree with this contention,[2] but we believe that the question need not be decided because reversal of the judgment below is necessary without reference to the trial court transcript.

court's refusal to grant a continuance in order that Petitioner might have the assistance of the counsel he had retained.

[1] Four of the last eight right-to-counsel cases decided by this Court originated in Florida. *Carnley v. Cochran*, 369 U.S. 506 (1962); *Reynolds v. Cochran*, 365 U.S. 525 (1961); *White v. Maryland*, 373 U.S. 59 (1963); *Cash v. Culver*, 358 U.S. 633 (1959).

[2] Petitioner submits that the record before a lower court may be supplemented in this Court, and in the exercise of its jurisdiction over the present case, this Court may consider the proceedings in the trial court to the extent necessary and appropriate. See *Petitioner's Memorandum in Opposition to Respondent's Motion to Strike Paragraphs 1 and 2 of Petitioner's Designation for Printing*, pp. 2-3.

OPINION BELOW

The order of the Supreme Court of Florida denying Petitioner's application for a writ of habeas corpus appears as *Gideon* v. *Cochran*, 135 So. 2d 746 (Fla. 1961) (R. 47).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves Section 1 of the Fourteenth Amendment, U. S. Const.; Fla. Const., Declaration of Rights, §11; and Fla. Stats. §810.05 and §909.21 (1961). These provisions are reprinted in Appendix A, *infra*.

QUESTIONS PRESENTED

I. Does the denial by a state court of a request by an indigent defendant for the appointment of counsel to assist him at a trial for a serious criminal offense constitute a deprivation of the defendant's rights in violation of the Fourteenth Amendment? Should this Court's holding in *Betts* v. *Brady*, 316 U.S. 455 (1942), be overruled?

II. In the present case, did the refusal of the state court to appoint counsel to assist Petitioner at trial, Petitioner having expressly requested such assistance, deprive Petitioner, an indigent person, of his rights in violation of the Fourteenth Amendment?

SUMMARY OF ARGUMENT

This case presents the issue whether *Betts* v. *Brady*, 316 U.S. 455 (1942), should be overruled. It illustrates the denial of due process and equal protection consequent upon the refusal to appoint counsel in a state felony prosecution; but we cannot urge that the circumstances presented by the case are "special" rather than typical. The Petitioner is not illiterate, mentally incompetent, or inexperienced. The statute defining the offense with which petitioner is charged presents issues of fact and law; but so do most criminal statutes. The conduct of the trial left much to be desired; but this is an inevitable consequence of the absence of defense counsel, and we cannot attribute to the trial judge or prosecutor animus or a deviation from normal standards.

Betts v. *Brady* should be overruled. The Fourteenth Amendment requires that counsel be made available to the accused in every case of arrest and prosecution in the states for serious criminal offense.

I

An accused person cannot effectively defend himself. The assistance of counsel is necessary to "due process" and to a fair trial. Without counsel, the accused cannot possibly evaluate the lawfulness of his arrest, the validity of the indictment or information, whether preliminary motions should be filed, whether a search or seizure has been lawful, whether a "confession" is admissible, etc. He cannot determine whether he is responsible for the crime as charged or a lesser offense. He cannot discuss the possibilities of pleading to a lesser offense. He cannot evaluate the grand or petit jury. At the trial he cannot interpose objections to evidence

or cross-examine witnesses, etc. He is at a loss in the sentencing procedure.

An indigent is almost always in jail, unable to make bail. He cannot prepare his defense.

There is no distinction between the need for counsel in federal and in state cases. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), recognizes the need in federal cases.

The trial judge cannot perform the function of counsel.

There is no basis for distinguishing between the need for counsel in capital and in non-capital cases. Indeed, the need may be greater in the latter because of complexity of issues. This Court has rejected the distinction between capital and other offenses in the court-martial cases and with respect to the obligation of the states to furnish transcripts to destitute persons on appeal. (*Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960); *Griffin* v. *Illinois*, 351 U.S. 12 (1956).

To convict the poor without counsel while we guarantee a right to counsel to those who can afford it is also a denial of equal protection of the laws.

II

Regard for federalism does not justify the "special circumstances" restriction of *Betts* v. *Brady*. On the contrary, the rule creates friction between state and federal courts. It impairs the values of federalism.

All but five states now make provision for appointment of counsel for indigents in all felony cases, either expressly or as a matter of practice.

The "special circumstances" rule involves federal supervision over state courts in a most obnoxious form: *ad hoc* and *post facto*.

The absence of counsel is responsible in large measure for the flood of habeas corpus petitions in the federal courts which create state-federal friction and constitute a burden on the federal system. The *post facto* nature of *Betts* v. *Brady* means that prisoners languish in jail, sometimes for many years, before their rights are vindicated.

III

The "special circumstances" test is not capable of proper application. This Court has applied it in ways which seem contradictory. State courts have disregarded or misapplied it.

Proper application of the principle of federalism dictates that the constitutional requirement of due process be affirmed and not curtailed, and that the states should be given latitude in devising *methods* to assure compliance with the constitutional principle.

The supposed practical consequences should not frustrate vindication of the constitutional principle. *Cf. Mapp* v. *Ohio*, 367 U.S. 643 (1961). In any event, prisoners whose convictions are set aside because of denial of counsel may be retried.

ARGUMENT

I. THE FOURTEENTH AMENDMENT REQUIRES THAT COUNSEL BE APPOINTED TO REPRESENT AN INDIGENT DEFENDANT IN EVERY CRIMINAL CASE INVOLVING A SERIOUS OFFENSE

In *Betts* v. *Brady*, 316 U.S. 455, decided in 1942, this Court ruled "that the 14th Amendment does not require that the state courts furnish counsel to an indigent defendant in a non-capital case unless the total facts and circumstances in the particular case show that there has been "a denial of fundamental fairness, shocking to the universal sense of justice." *Id.* at 462. In short, counsel need not be appointed unless there are "special circumstances showing that without a lawyer a defendant could not have an adequate and a fair defense." *Palmer* v. *Ashe*, 342 U.S. 134, 135 (1951).[7]

For twenty years, this Court, the lower federal courts, and the courts of a number of states have been

[7] In *Uveges* v. *Pennsylvania*, 335 U.S. 437 (1948), Mr. Justice Reed summarized the situation, which has obtained until the present, as follows:

> "Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance . . . Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. See Betts v. Brady, . . . Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group hold that the accused must have legal assistance under the Amendment . . . whether he requests counsel or not." (335 U.S. at 440-441).

charged with the duty of administering this rule. The experience has not been a happy one. We respectfully suggest that the data, summarized in this brief, demonstrate that the quality of criminal justice and the relations between the federal and state courts, have suffered as a result of *Betts* v. *Brady*.

We believe that "time has set its face"[*] against *Betts* v. *Brady*; that a fresh evaluation of the holding in that case is timely and appropriate; and that *Betts* v. *Brady* should be overruled in the present case.[**]

In the following portions of this brief, we believe that we shall demonstrate that the "special circumstances" rule, devised to assure the 14th Amendment's requirement of due process in state criminal cases, has not achieved its basic constitutional objective: It has not assured and cannot be expected to assure that counsel will be provided where necessary in the interests of fundamental fairness in state criminal proceedings.

We shall also show, we believe, the overwhelming evidence that the rule of *Betts* v. *Brady* is not compatible with due respect for the separate processes of the states. It is not an appropriate adaptation of the 14th Amendment to the demands of federalism. To

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[*] *Maggi* v. *Ohio*, 367 U.S. 643, 653 (1961).

[**] "[T]his court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." *Smith* v. *Allwright*, 321 U.S. 649, 665 (1944); and the Court has often overruled its earlier decisions in light of additional experience. Reappraisal is particularly appropriate in cases raising issues of due process, since "'Due process' is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society." *Griffin* v. *Illinois*, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring).

the contrary, it is a rule which compels continual, unseemly, and improper intervention by the federal courts in state criminal proceedings—not on the basis of applying a concrete, fundamental principle but by the corrosive and irritating process of case-by-case review. *Betts* v. *Brady* has produced and will continue to produce a series of *ad hoc* decisions by this Court and other federal courts—exercising supervision over the conduct of trials by state courts and state judges—which are disruptive of our federal system and which create friction between the states and the federal government.

In other words, *Betts* v. *Brady* has not meant, and will not mean, *less* federal intervention in state criminal proceedings than would be the case if the 14th Amendment were construed to require that counsel be furnished in all state criminal prosecutions. Because of the intensely factual, subjective, and *post-facto* nature of its standards, *Betts* v. *Brady* means *more* federal intervention on a case by case basis, and in a much more exacerbating form.

The present case, in our opinion, raises the fundamental question as to whether *Betts* v. *Brady* should be overruled. Apart from the technical and procedural question resulting from the failure of petitioner to allege special circumstances and from the nature of the proceedings before the Florida Supreme Court to which we have referred above, we can claim neither extreme youth, inexperience, mental incapacity, nor illiteracy on the part of the defendant. It is true that the defendant could not possibly have fully understood the legal subtleties of the crime with which he was charged; he could not have been aware of the decisions of the Supreme Court of Florida or principles of *corpus*

juris which might affect his defense. He could not have been alert to the opportunities theoretically offered by the law to cope with the problems of jury selection or the testimony of witnesses adduced by the State. It is true, too, that the judge in Gideon's case did not serve as Gideon's defense counsel—although it is obvious that he tried to conduct the trial fairly.

In Appendix B to this Brief we analyze the specific points that demonstrate that Gideon did not receive the benefits and protection which would presumably have been afforded him by counsel. We believe that these constitute a vivid demonstration of the fact that he was deprived of his due process rights under the Fourteenth Amendment: that he did not have a fair trial in the constitutional sense. But it is our opinion that these points are not peculiar to Gideon's case. We believe, *mutatis mutandis*, these points are present in every criminal prosecution. In short, we believe that the circumstances of this case are no more "special" than in other criminal cases—unless we are to draw a line between tweedledee and tweedledum. We are therefore of the opinion that the fundamental question of *Betts* v. *Brady* is at issue in the present case.

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1. *The aid of counsel is indispensible to a fair hearing.* As we shall discuss, we believe that the real point of difference between the advocates and opponents of the "special circumstances" rule of *Betts* v. *Brady* relates to the requirements of federalism in the application of the Fourteenth Amendment. It is not the issue of whether counsel is or is not needed for a trial which is fair and decent. The necessity for counsel in a criminal case is too plain for argument. No individual who is not a trained or

experienced lawyer can possibly know or pursue the technical, elaborate, and sophisticated measures which are necessary to assemble and appraise the facts, analyze the law, determine contentions, negotiate the plea, or marshal and present all of the factual and legal considerations which have a bearing upon his defense.[10] Even a trained, experienced criminal lawyer cannot—and will not, if he is sensible—undertake his own defense.[11]

In the absence of counsel an accused person cannot determine whether his arrest is lawful; whether the indictment or information is valid; what, if any, preliminary motions should be filed. He cannot accurately evaluate the implications of a plea to a lesser offense, and he is at a loss in discussions with the prosecuting attorney relating to such a plea.[12]

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[10] The rule that only a qualified and licensed lawyer may represent another in our courts is based, in part at least, on the assumption that a certain amount of skill is necessary to the task.

[11] "He that is his own lawyer has a fool for a client." *The Oxford Dictionary of English Proverbs* 112 (2d ed. 1948). This adage has a psychiatric basis. To expect that an accused person, particularly an indigent, usually friendless, defendant can or will rise to the level of operating skill and efficiency necessary to functioning in the criminal process, is to expect the impossible. Most defendants, after arrest and imprisonment, cannot even function at their normal level of competence.

[12] "Men entering an initial plea of not guilty were significantly more often represented by defense attorneys than the men pleading guilty immediately." Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J.Crim.L.,C. & P.S. 780, 782 (1956).

"The methods used by the prosecutor and the judge to obtain a plea of guilty to a lesser charge from an unrepresented defendant often amount to downright coercion performed in open court." Dash, *Cracks in the Foundation of Justice*, 46 Ill. L. Rev. 385, 393 (1951).

The indigent, apart from all other considerations, has probably been in jail from the time of arrest because of inability to furnish bail. How can he prepare his case? And how unreal it is to suppose that a layman can conduct a *voir dire* of the petit jury, or cross-examine the prosecution's witnesses, or interpose objections to incompetent and prejudicial testimony. See Douglas, J., concurring in *Carnley v. Cochran*, 369 U.S. 506 (1962). The truth is that "The unrepresented defendant in many cases does not really know what is going on . . ." Ass'n. of the Bar of the City of New York, *Report of the Magistrate's Courts Visitation Committee* 30 (undated). As this Court pointed out in *Reynolds v. Cochran*, 365 U.S. 525, 532-33 (1961), "even in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value."[13]

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[13] A comprehensive study of the New York City Municipal Courts revealed that, in 1958, 51% of all defendants did not post bond. Note, *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693, 707 (1958). A field study of the metropolitan courts of Philadelphia established that 75% of all defendants charged with serious crimes where bail is set by the court were held in jail from the time of arrest to trial. Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. Pa. L. Rev. 1031, 1048 (1954). See also Note, *Bail: An Ancient Practice Reexamined*, 70 Yale L. J. 966, 970 (1961).

[14] In a powerful passage, often quoted, Mr. Justice Sutherland summed up why the assistance of counsel is indispensable to a fair hearing as follows:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of

In the event of conviction, the unrepresented defendant is further seriously disadvantaged at the sentencing stage.

> "Automatic sanctions, which predominated in earlier historical periods, have been largely replaced by judicial discretion. . . . Consequently, [counsel] may be called upon to play a role in sentencing which requires wide knowledge and experience." Ass'n. of the Bar of the City of New York, Special Committee to Study Defender Systems, *Equal Justice for the Accused* 35-36 (1959).

See also *Gadsden* v. *United States*, 223 F. 2d 627, 630-33 (D.C. Cir. 1955); Kadish, *The Advocate and the Expert—Counsel in the Penal Correctional Process*, 45 Minn. L. Rev. 803, 806 (1961).

Moreover, it is patent that many constitutional rights are meaningless in the absence of legal assist-

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evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932).

See also, Pollock, *Equal Justice In Practice*, 45 Minn. L. Rev. 737, 741-743 (1961); Note, *Metropolitan Criminal Courts of First Instance*, 70 Harv. L. Rev. 320 (1956); Willcox and Blumstein, *Account of a Field Study in a Rural Area of the Representation of Indigents Accused of Crime*, 59 Colum. L. Rev. 551 (1959); Barth, *The Price of Liberty* 159 (1961).

ance. As an eminent State Supreme Court judge has stated: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956).

In the past twenty years, this Court has stated a number of principles of constitutional law with respect to state criminal procedure, which have a direct and practical bearing on the conduct of trials. The law of involuntary confessions and searches and seizures as applied to the states, for example, postdates almost in its entirety the decision in *Betts* v. *Brady*.[15] Important procedural safeguards cannot be implemented effectively without the assistance of counsel. An uncounseled defendant manifestly cannot be expected, for example, to be a master of the intricacies of the law relating to searches and seizures, e.g., whether a search warrant is required, whether

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[15] See *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Culombe* v. *Connecticut*, 367 U.S. 568 (1961); *Spano* v. *New York*, 360 U.S. 315 (1959); *Rochin* v. *California*, 342 U.S. 165 (1952).

There have been important developments since 1942 relating to other aspects of state criminal procedure, e.g., the prohibition against cruel and unusual punishment, *Robinson* v. *California*, 370 U.S. 660 (1962); the right to a validly selected grand jury and to a fair trial by the petit jury, *Reece* v. *Georgia*, 350 U.S. 85 (1955); *Shepherd* v. *Florida*, 341 U.S. 50 (1951) (concurring opinion of Jackson and Frankfurter, JJ.); the necessity for a public trial, *In re Oliver*, 333 U.S. 257 (1948); and misconduct by the prosecution, *Alcorta* v. *Texas*, 355 U.S. 28 (1957). See Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L.Rev. 761, 769-778 (1961); Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 De Paul L.Rev. 213 (1958).

there is "probable cause," whether there has been a waiver, and so on. An inexperienced person cannot possibly appraise the implications of invoking the privilege against self-incrimination or determine whether a statement he wishes to make may constitute a waiver of the privilege.[16] In brief, what is required for the effective assertion of constitutional rights and privileges is "the assistance of a learned gentleman to speak for an unlearned man" (5 The Speeches of the Right Hon. Charles James Fox in the House of Commons (London 1815) 78, quoted by Mr. Justice Clark in *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 244, n. 10 [1960]).

2. *The absolute requirement of counsel in federal prosecutions confirms the need for an attorney.* The parallel development of the right to counsel in the federal courts confirms the conclusion that an unrepresented defendant cannot adequately advocate his rights. In 1938, in *Johnson* v. *Zerbst*, 304 U.S. 458, this Court held that counsel must be furnished in every case to a person tried in the federal courts. To quote the Court:

> "If the accused . . . is not represented by Counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid con-

[16] "Even if advised that he has a right to speak, the unrepresented defendant often chooses to remain silent for fear of self-inerimination. The manner in which the assistant district attorneys inform unrepresented defendants of their constitutional rights to remain silent seems to imply that it is always to the accused's great advantage to refuse to speak." Comment, *Preliminary Hearings on Indictable Offenses in Philadelphia*, 106 U. Pa. L. Rev. 589, 591 (1958).

> viction and sentence depriving him of his life or his liberty." 304 U.S. at 468.

Johnson v. Zerbst was not the unchallenged product of the ineluctable language of the Sixth Amendment. There are those who assert that the right conferred on the accused "to have the assistance of counsel for his defense" meant only "that in the Federal courts the defendant in a criminal case was entitled to be represented by counsel retained by him," and that it did not comprehend "the right of a prisoner to have counsel assigned to him by the court if, for financial or other reasons, he was unable to retain counsel." Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N. Y. L. Q. Rev. 1, 7-8 (1944).

That view was rejected by the Court in *Johnson v. Zerbst*. In speaking for the Court, Mr. Justice Black made it clear that the conclusion of the case rested upon

> "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel." 304 U.S. at 462-463.[17]

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[17] The ruling is reflected (although inadequately, in our view) in Rule 44, Fed. R. Crim. P.: "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

Our accusatorial system of criminal justice presupposes that the cause of the defendant as well as that of the state will be vigorously advocated.[18]

It makes no sense to urge that the availability of counsel is required in the federal courts in order "to insure fundamental human rights of life and liberty" (*id.* at 304 U.S. 462), but that it is not fundamental if the prosecution occurs in a state courthouse.[19] We do not think it arguable that federal judges or prosecutors are less solicitous of the accused than are their state counterparts, or that the indigent accused in state criminal proceedings are more learned in the law than their counterparts who are involved in the federal process.

3. *The trial judge cannot act as defense counsel.* The trial judge must assure himself by a meticulous

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[18] Our adversary system presumes that "each litigant is most interested and will be most effective in seeking, discovering, and presenting the materials which will reveal the strength of his own case and the weakness of his adversary's case so that the truth will emerge to the impartial tribunal that makes the decision." Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* 3 (1956).

[19] "An English court will not hear a criminal case without a defense counsel if the defendant desires one." Section of Criminal Law of the A.B.A., *A Comparative Study of Criminal Law Administration in the United States and Great Britain*, 50 J. Crim. L., C. & P.S. 59, 66 (1959). See Devlin, *The Criminal Prosecution in England* 127 (1958): "[I]t is very rare that an accused who has any sort of defense to put forward has to prepare and present it without legal assistance"; Waddington, *The Development of Legal Aid in England Since 1949*, 48 A.B.A.J. 1029, 1030 (1962): "[T]he tendency today is to grant legal aid in all cases, at all stages of the trial and of any appeal, and whether or not there is a plea of guilty.

and thorough investigation that the accused has not ignorantly or incompetently waived his right to counsel. *Von Moltke* v. *Gillies*, 332 U.S. 708, 723-24 (1948), but we do not believe that it can properly be urged that the trial judge can or should perform the functions of ascertaining and advancing the legal and factual points available to the accused.[20] The judge comes on the scene too late in point of time; crucial events have already taken place and important decisions made by default or otherwise. The judge cannot investigate the facts; he cannot and should not engage in the probing of a defendant necessary for representation; he cannot and should not cross-examine the state's witnesses.

In a word, a man cannot act both as trial judge and as defense counsel. As Mr. Justice Sutherland stated, in speaking for the Court in *Powell* v. *Alabama*, 287 U.S. 45, 61 (1932):

> "[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of

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[20] Blackstone characterized the English common law rule denying the assistance of counsel in most felony prosecutions (changed by Parliament in 1836, 6 & 7 Wm. 4, 114, s.1) as "[A] rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law." IV Bl. Comm., pp. 348-350 (Clarendon Press 1767). Blackstone noted that Coke (3 Inst. 137) gave as a reason for denying the right to counsel that "the evidence to convict a person should be so manifest, as it could not be contradicted." Blackstone pointed out that "to say the truth, the judges themselves are so sensible of this defect that they allow counsel to stand by the prisoner, suggest questions or even ask them."

counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."

4. *The distinction between capital and non-capital offenses does not furnish a valid basis for deciding when to appoint counsel.* In one class of criminal cases tried in the state courts—those involving capital offenses—this Court has rejected the *Betts* v. *Brady* rule. *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *Uveges* v. *Pennsylvania*, 335 U.S. 437, 441 (1948); *Bute* v. *Illinois*, 333 U.S. 640, 674 (1948). As the Court stated in *Hamilton* v. *Alabama*, *supra*: "When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." 368 U.S. at 55.[21]

We do not believe this distinction between capital and non-capital offenses furnishes an appropriate or constitutionally valid basis for determining when counsel must be appointed. The due process clause protects against deprivation of "liberty" and "property" as well as against deprivation of "life."[22] Moreover, the

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[21] In the present case, the trial court rejected Gideon's request for legal assistance on the grounds that "Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense." (R. 9).

[22] There are some who believe that life imprisonment is a more terrible penalty than a death sentence. See Barzun, *In Favor of Capital Punishment*, 31 American Scholar 181 (1962).

necessity for legal assistance, not the nature of the sanction, should be the controlling consideration. As one commentator has observed:

> "[I]n determining whether absence of counsel has denied a fair hearing, the important consideration seems less the penalties that may be imposed than the *need* for skilled representation. Any experienced defense lawyer is likely to testify that most murder cases, in which capital penalties are involved, are by no means the most difficult to try or those in which representation is most urgently required. Indictments charging such crimes as embezzlement, confidence game, or conspiracy are likely to place the defendant in a far more helpless position. The distinction that the Court has drawn lacks integrity; and so long as it persists, the law of the subject will remain in a state of unstable equilibrium." Allen, *The Supreme Court and State Criminal Justice*, 4 Wayne L. Rev. 191, 197 (1958).

This Court has specifically rejected the distinction between capital and non-capital offenses in the military court-martial cases, involving rights secured by Article III and the Fifth and Sixth Amendments. *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960). In view of the importance of the court-martial cases to this particular issue, we discuss the cases at more length in Appendix C, *infra*.

It is true that these court-martial decisions involved the power of Congress under Art. 1, §8, "To make Rules for the Government and Regulation of the land and naval Forces" and did not involve limitations upon state power under the Fourteenth Amendment. The cases turned upon the status of the accused. But if the capital and non-capital distinction is rejected

in a case involving the right to trial by jury before a constitutionally appointed judge, among other privileges, we perceive no reason why it should be considered as controlling with respect to the closely allied right to counsel.

Further, in 1961, this Court in *Ferguson* v. *Georgia*, 365 U.S. 570, rejected the capital-non-capital distinction in a Fourteenth Amendment case. The Court concluded in that case that the Fourteenth Amendment invalidated a Georgia statute which prohibited a defendant in a criminal case from testifying under oath in his own defense, in response to questions of counsel. The Court stated:

> "Our decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a non-capital offense, or represented by appointed counsel." 365 U.S. at 596.

Griffin v. *Illinois*, 351 U.S. 12 (1956), a non-capital case, similarly rejected the capital-non-capital distinction with respect to the availability to indigents of transcripts for appeal purposes.[23]

In sum, we submit that the possibility of a death sentence does not constitute a valid constitutional cri-

[23] Indigent defendants sentenced to death were provided by Illinois with a free transcript for purposes of appellate review, but in all other cases the defendant was required to buy the transcript. *Id.* at 14. The Court held that the state was required to furnish means for effective review to all defendants. The dissenting Justices urged that the distinction between capital and non-capital cases made by Illinois law was valid and reasonable. *Id.* at 27-28.

terion for determining who shall have the assistance of counsel.

5. *Denial of counsel to the indigent violates both due process and equal protection.* The refusal to appoint an attorney to represent a destitute person results in discrimination against defendants based solely upon poverty. There is no doubt that a defendant in a state criminal trial has an unqualified right under the Fourteenth Amendment to be heard through counsel he has retained. *Chandler* v. *Fretag*, 348 U.S. 3, 9 (1954); see *In re Groban's Petition*, 352 U.S. 330, 332 (1957). We submit that if a person with funds is entitled to be heard through an attorney, the same privilege must be extended to indigents. In the case of those able financially to hire counsel, the rule is not limited to capital cases or to "special circumstances." It is absolute and complete, and a state may not restrict it. How, then, can the right be restricted in the case of the poor? We have agreed since *Powell* v. *Alabama*, 287 U.S. 45 (1932), that the state has a duty to appoint counsel for the indigent in at least some criminal cases in order to meet the requirements of due process. If this is so, counsel must be provided in all criminal cases in which there is a constitutional requirement to permit counsel to appear and act for those who have the funds to hire them. The indigent defendant cannot be denied an "unqualified right" solely because of poverty; to do so results in a denial of equal protection. "The need of counsel is the same, whatever the economic status of the accused." *McNeal* v. *Culver*, 365 U.S. 109, 118 (1961) (Douglas, J., concurring); see also Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1, 10-11 (1960).

This principle was articulated in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), which held that the Fourteenth Amendment requires that "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U.S. at 19. The Court said that the

> "constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" 351 U. S. at 17.

And the Court added:

> "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. . . . There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. at 17-19.

See *Willcox* and *Bloustein; The Griffin Case—Poverty and the Fourteenth Amendment*, 43 Cornell L.Q. 1, 23 (1957); see also *Smith* v. *Bennett*, 365 U.S. 708 (1961); *Douglas* v. *Green*, 363 U.S. 192 (1960); *Burns* v. *Ohio*, 360 U.S. 252 (1959); *Eskridge* v. *Washington Prison Bd.*, 357 U.S. 214 (1958); *cf. Coppedge* v. *United States*, 369 U.S. 438 (1962).

Where counsel are not designated to assist indigent persons, whether a defense of any kind will be asserted, and the type of defense, tends to depend more upon the personality and temperament of the accused than upon guilt or innocence or any other factor. The large percentage of guilty pleas in our courts [24] may reflect the helplessness of the arrested and their lack of counsel as well as the efficiency of the police. Certainly, the frequency of guilty pleas suggests that those who are arrested, particularly the penniless and persons who are members of minority groups, are more likely hopelessly to resign themselves to fate than aggressively to act like the defense counsel portrayed on television. In sum:

> "To say that trials without counsel can be fair is to assume either that the defense which counsel might have presented would not have changed the result in the case or that in certain types of cases counsel serves no useful function. The first assumption is hindsight and unprovable. The second, if true, would convict a portion of the bar of taking money under false pretenses in all those 'simple' cases where counsel accepts a retainer but

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[24] "[T]he overwhelming proportion of cases (75 to 90 per cent) . . . are decided by pleas of guilty." Goldstein, *The State and The Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L. J. 1149, 1180 (1960).

"Men entering an initial plea of not guilty were significantly more often represented by defense attorneys than the men pleading guilty immediately." Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. Crim. L., C. & P. S. 780, 782 (1956).

"If the defendant is represented by counsel, it is more likely that he will be permitted to present a defense." Comment, *Preliminary Hearings on Indictable Offenses in Philadelphia*, 106 U. Pa. L. Rev. 589, 591 (1958).

apparently cannot influence the result. We cannot with justice keep the existing 'fight' theory of criminal law and force the indigent defendant to fight alone. If our vaunted claim of 'equal justice under law' is to be more than an idle pretense, the right to have counsel must be extended in practice to all persons accused of crime." Beaney, *The Right to Counsel in American Courts* 234-235 (1955).

II. THE DEMANDS OF FEDERALISM DO NOT DICTATE CONTINUED ADHERENCE TO BETTS V. BRADY

In view of the foregoing, we believe that the real argument against the position that the 14th Amendment requires that counsel be furnished to indigent persons in all state criminal proceedings is that it "would disregard the basic and historic power of the states to prescribe their own local court procedures," i.e., the demands of federalism. *Bute* v. *Illinois*, 333 U.S. 640, 668 (1948).[25] We submit two answers to this argument: *First*, we do not believe it necessary to dilute, denigrate, and diminish the quality of due process in our criminal proceedings or subtract from the equal administration of justice in deference to the few states, like Florida, which continue to defy the general opinion as to the right to counsel. *Second*, we believe that the argument is based on a premise that experience has rejected. The "special circumstances" rule

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[25] The history of the right to counsel in England and the United States during the past three centuries reflects a steady, unmistakable evolution toward complete recognition of the right. See *Powell* v. *Alabama*, 287 U.S. 45, 60-65 (1932); Beaney, *The Right to Counsel in American Courts* 8-26, 225-228 (1955); Becker and Heidelbaugh, *The Right to Counsel in Criminal Cases—An Inquiry into the History and Practice in England and America*, 28 Notre Dame Law. 351 (1953).

increases the problems of federalism. It does not decrease them.

1. *The great majority of the states now make provision for the appointment of counsel in all felony cases, either explicitly or as a matter of practice.* In 1942, the Court concluded in *Betts* v. *Brady*, after canvassing the law in each state, that

> "in the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial." *Betts* v. *Brady*, 316 U.S. at 471.

This factual premise of *Betts* v. *Brady* has evaporated during the past twenty years.

> "Although not every state today offers counsel to the indigent defendant in the serious, but non-capital, criminal case, the trend is unmistakably in that direction." Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 9 (1956).

In 1961, in an appendix attached to a concurring opinion in *McNeal* v. *Culver*, 365 U.S. 109, 119-122, Mr. Justice Douglas listed 35 states which provide for "Appointment of counsel for indigents in all felony cases, as of course, by force of the State Constitution, statutes, court rule, or judicial decision." (*Id.* at 120). Subsequent to compilation of the appendix, Colorado made appointment of counsel obligatory in all felony cases, Colo.R.Crim P. 44 (set out in 34 Rocky Mt. L. Rev. 1, 89 [1961]), and Michigan apparently should be added to the list, see Mich. Ct. R. 35A (Honigman's Mich. Ct. Rules Anno.).

There are thus presently thirty-seven states which expressly provide, in one form or another, for the designation of counsel in behalf of destitute defendants in all felony cases. In a majority of the states listed in Justice Douglas' appendix in *McNeal v. Culver, supra*, the court must inform the accused of his right to counsel and inquire whether he desires an attorney. In all thirty-seven states appointment is mandatory in all felony cases if requested by the defendant. See Appendix, "Provision for the Assignment of Counsel for Indigent Defendants in Criminal Cases," in Ass'n. of the Bar of the City of New York, Special Committee to Study Defender Systems, *Equal Justice for the Accused* (1959).

Farther, a study, just completed, concludes on the basis of extensive documentation that of the remaining thirteen states, it is the general practice in eight states —Pennsylvania, Maryland, Maine, New Hampshire, Rhode Island, Vermont, Delaware, and Hawaii—to furnish legal assistance in each case where such aid is requested. Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on 'The Most Pervasive Right' of an Accused*, 30 U. of Chi. L. Rev. 1 (1962).[26]

There remain only five states— Alabama, Florida, Mississippi, North Carolina, and South Carolina — which do not make provision for appointment of counsel in behalf of indigents in all felony cases. Even in these states, however, there are cities and counties where public defenders or court appointed counsel are assigned to represent impoverished defendants at vari-

[26] Professor Kamisar made available to counsel the manuscript of his valuable article prior to its publication.

ous stages in the proceeding." See Kamisar, *op. cit. supra.*

There is far less contrariety of views among the States with respect to the right to counsel than was the case with respect to the exclusion of evidence secured by an illegal search and seizure. When *Mapp v. Ohio*, 367 U.S. 643, was decided in 1961, one-half of the states still adhered to the rule that illegally seized evidence was admissible. 367 U.S. at 680 (dissenting opinion); see *Elkins v. United States*, 364 U.S. 206, 224 (1960). This Court held, however, that the 14th Amendment required that the state courts exclude unlawfully procured evidence. With respect to the plea that the decision infringed the principle of federalism, the Court said (367 U.S. at 656):

> "This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of

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"The practice in a number of the larger counties in Florida also goes far beyond the demands of *Betts*. In Dade County (Miami), the largest county in the state, 'the Public Defender acts as counsel for all indigent felony defendants who are in jail and unable to make bond,' entering the picture 'at or before arraignment.' The same practice prevails for the large counties of Broward (Fort Lauderdale) (public defender) and Duval (Jacksonville) (court appointed counsel). A public defender also operates in Hillsborough County (Tampa), but apparently represents only those who have pled not guilty and are awaiting trial. Thus, despite the presence of a public defender, indigent defendants in this populous county are without counsel at the 'critical' arraignment stage. The practice throughout the rest of the state varies a good deal, but indigent non-capital defendants, it appears, are not furnished counsel generally, although they are in the 'more serious and more complicated cases.'" Kamisar, *op. cit. supra.* See Sen. Judiciary Committee, Subcommittee on Constitutional Rights, *Legal Counsel for Indigent Defendants in Federal Courts*, p. 9 (1961).

> a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession . . ."

We recognize, of course, that resolution of an important question of constitutional law cannot and should not be made simply by taking a census of the states. But the practice among the states was emphasized in *Betts* v. *Brady* as a factor to be used in determining the standard of procedural fairness required by the due process clause. *Betts* v. *Brady*, 316 U.S. at 465. There is no doubt that there is today widespread consensus among the states that legal assistance should be furnished to indigent persons. Further, it is a principle which has the overwhelming support of the bar.[28] The task here is essentially a modest one: to bring into line with the consensus of the states and professional opinion the few "stragglers" who persist in denying fair treatment to the accused.*

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[28] See e.g., Ass'n. of the Bar of the City of New York, Special Committee to Study Defender Systems, *Equal Justice for the Accused* 56 (1959). There are now 96 defender offices in the United States, including 77 public defender offices. Brownell, *Legal Aid in the United States, 1961 Supplement* 14 (1961). "The Legal Aid movement is now almost universally accepted as being morally and ethically correct and as deserving the support of the general public." *Summary of Conference Proceedings of the National Legal Aid and Defender Association* 9 (1959). See also Symposium, *The Right to Counsel*, 45 Minn. L. Rev. 693-896 (1961).

* Counsel for Petitioner has been informed that twenty-two states are filing a joint brief as Amici in the present case urging that *Betts* v. *Brady* be overruled. The states involved are Alaska, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, Ohio, North Dakota, Oregon, Rhode Island, South Dakota, Washington, and West Virginia.

2. *Betts v. Brady has created friction between the states and the Federal Courts.* Two decades of experience have borne out the forecast of Mr. Justice Black, dissenting in *Betts* v. *Brady*, that the "special circumstances" test would require this Court and other federal courts to exercise "vast supervisory powers" over the state courts. 316 U.S. at 475. *Betts* v. *Brady* has engendered conflict between the federal and state courts because of the case by case review it entails and because it does not prescribe a clearcut standard which the state courts can follow. As one commentator has noted: "[T]he very vagueness of the fair-trial test has encouraged recourse to the lower federal courts and to the Supreme Court by state convicts." Beaney, *The Right to Counsel in American Courts* 196 (1955).

A vast number of petitions have been filed in the federal courts collaterally attacking the validity of convictions for failure to assign counsel. A recent study of 35 federal habeas corpus cases in which a state prisoner successfully attacked the judgment under which he was committed led to the following conclusions:

> "A most striking fact discovered from the 35 cases studied is the dominance of the issue of right to counsel as the contention most likely to succeed in federal habeas corpus. In roughly half of the cases, the state judgment fell on this ground. As only four of these cases involved a capital offense, *the largest stumbling block in the administration of state criminal law is revealed as the nonabsolute right to counsel for indigents in noncapital cases.*" Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461, 483 (1960) (emphasis supplied).

Moreover, the "special circumstances" rule involves federal supervision over the state courts in its most noxious form. In effect, the federal courts are given a roving commission to scrutinize the proceeding in the state court to determine if it is "shocking to the universal sense of justice." It is difficult to conceive of a test more likely to promote friction between federal and state tribunals. But, as Mr. Justice Stewart has stated, "The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." *Elkins* v. *United States*, 364 U.S. 206, 221 (1960).

Finally, the flood of habeas corpus petitions spawned by *Betts* has led to agitation to curtail the "Great Writ." The undesirable consequences of *Betts* thus extend beyond the immediate issue of right to counsel. A decision overruling *Betts* would benefit the federalist principle by eliminating a major irritant.

3. *Experimentation by the States will not be eliminated if the special circumstances is jettisoned.* An absolute rule that counsel must be furnished indigents accused of serious offenses will still leave open an area in which federalism will operate. The states undoubtedly will meet the demands of the rule in a variety of ways. Some states may elect to provide counsel through a governmentally financed public defender system;[20] others through court assignment of

[20] A bill (S. 2900) authorizing each federal district court to appoint a public defender was approved by the Senate in the 87th Congress, 2d Session. See 108 Cong. Rec. 21079 (Oct. 4, 1962). The bill provides that if the court "is satisfied that a defendant charged with a felony or misdemeanor (other than a petty offense as defined in [18 U.S.C. § 1(3)]) is unable to employ counsel because he is indigent, it may assign the public defender to represent such defendant . . ." Provision is made for compensating the public defender.

members of the bar; still others by use of a privately financed voluntary defender system. See Ass'n. of the Bar of the City of New York, Special Committee to Study Defender Systems, *Equal Justice for the Accused* 47-53 (1959). Some states may choose to follow the system established by Congress in the District of Columbia Legal Aid Act. (74 Stat. 229; D. C. Code Anno. § 2-2201-2210 (1961 ed.)), which provides for compensation to counsel employed by a publicly financed legal aid agency and reimbursement of expenses to volunteer or court-assigned counsel.[*]

In other words, the states will remain at liberty to experiment and to adopt a system for the appointment of counsel consonant with community needs and resources, subject only to the requirement that the system adopted fulfill the constitutional imperative and guarantee effective legal aid to all persons accused of a serious offense who do not competently and intelligently waive such assistance. We believe that this is an instance of federalism in operation in an appropriate form: Under our system, we submit, the demands and the benefits of federalism should take the form of a diversity of *method*. Federalism properly considered does not demand or permit a negation of basic constitutional principle.

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[*] Students who have received a law degree and are engaged in post-graduate study under a private grant are used extensively as assistants in this program in the District of Columbia. In Massachusetts, senior law students, certified by their dean as having special ability and training, may represent indigents, provided that their activities are under the "general supervision" of a member of the bar. Rule 11, General Rules, Sup. Jud. Court, (see Crane, *Court Rules Anno.*, 8 Mass. Practice [1961]).

III. THE RULE OF BETTS V. BRADY HAS NOT PROVED TO BE A SATISFACTORY STANDARD FOR JUDICIAL ADMINISTRATION

Two decades have shown that *Betts* v. *Brady* is not an operable guide.

1. The cases decided by this Court under the "special circumstances" test, to quote one commentator, "are distinguished neither by the consistency of their results nor by the cogency of their argument." Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 De Paul L. Rev. 213, 230 (1958). The difficulty inheres in the subjective, ambiguous nature of the rule itself. Thus, the following factors have been deemed relevant in deciding whether the proceeding was "fundamentally unfair":

(i) the complexity of the statute under which the defendant is prosecuted and the nature of the offense charged;[31]

(ii) the fact that specific objections or arguments could have been, but were not, made;[32]

(iii) illiteracy or lack of education;[33]

(iv) mental illness or mental retardation;[34]

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[31] E.g., *Carnley* v. *Cochran*, 369 U.S. 506 (1962); *Chewning* v. *Cunningham*, 368 U.S. 443 (1962); *Reynolds* v. *Cochran*, 365 U.S. 525 (1961); *Pennsylvania ex rel Herman* v. *Claudy*, 350 U.S. 116 (1956).

[32] E.g., *Hudson* v. *North Carolina*, 363 U.S. 697 (1960); *Gibbs* v. *Burke*, 337 U.S. 773 (1949).

[33] E.g., *McNeal* v. *Culver*, 365 U.S. 109 (1961); *Cash* v. *Culver*, 358 U.S. 633 (1959); *Moore* v. *Michigan*, 355 U.S. 155 (1957); *Reece* v. *Georgia*, 350 U.S. 85 (1955).

[34] E.g., *McNeal* v. *Culver*, 365 U.S. 109 (1961); *Massey* v. *Moore*, 348 U.S. 105 (1954); *Palmer* v. *Ashe*, 342 U.S. 134 (1951).

(v) youth of the accused;

(vi) a plea of guilty by a co-defendant;

(vii) the extent of the accused's prior experience with criminal proceedings;

(viii) the adequacy of guidance by the trial court;

(ix) misconduct by the trial judge or the prosecutor;[37]

(x) the severity of the sentence.[38]

No standards have been delineated, however, with respect to the weight or importance to be assigned each of the foregoing factors. Thus, for example, in *DeMeerleer* v. *Michigan*, 329 U.S. 663 (1947), the Court deemed the youth of the accused (seventeen) significant and reversed his conviction, but in *Gayes* v. *New York*, 332 U.S. 145 (1947), the conviction was not set aside, despite the fact that the defendant was "a lad of sixteen" (*id.* at 146) when he was convicted without counsel. In *Quicksall* v. *Michigan*, 339 U.S. 660 (1950), the Court felt it reasonable to presume from the accused's prior appearances in court that he knew of his right to counsel, and since he made no request for legal aid, his rights were held not infringed. But recently in *Carnley* v. *Cochran*, 369 U.S. 506

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[35] E.g., *Uveges* v. *Pennsylvania*, 335 U.S. 437 (1948); *DeMeerleer* v. *Michigan*, 329 U.S. 663 (1947).

[36] *Hudson* v. *North Carolina*, 363 U.S. 697 (1960); *Cash* v. *Culver*, 358 U.S. 633 (1959).

[37] *Uveges* v. *Pennsylvania*, 335 U.S. 437 (1948); *Wade* v. *Mayo*, 334 U.S. 672 (1948); *Quicksall* v. *Michigan*, 339 U.S. 660 (1950).

[38] *Gibbs* v. *Burke*, 337 U.S. 773 (1949).

[39] *Townsend* v. *Burke*, 334 U.S. 736 (1948).

[40] *Uveges* v. *Pennsylvania*, 335 U.S. 437 (1948).

(1962), the Court felt that a prior criminal record magnified the importance of the assistance of counsel because of its implications in the event the accused takes the witness stand.

It is likewise difficult to reconcile *Gryger* v. *Burke*, 334 U.S. 728 (1948), with *Townsend* v. *Burke*, 334 U.S. 736 (1948), both decided on the same day. In *Gryger*, a defendant sentenced to life imprisonment, argued that the state court mistakenly assumed that the applicable statute made the penalty mandatory. In *Townsend*, the defendant contended that the court imposed a sentence under the erroneous impression that defendant's record included convictions on two charges as to which, in fact, he had been acquitted. In both cases, the defendants, who were unrepresented, claimed that if counsel had been present the mistake would have been corrected. In *Townsend*, this Court concluded that the accused was so disadvantaged by lack of counsel that the conviction could not be permitted to stand, but in *Gryger* the Court affirmed the order denying habeas corpus. It is difficult to perceive why the denial of counsel was deemed prejudicial as a constitutional matter in one case but not in the other.

2. In the present case, the trial court did not call petitioner's attention to the "special circumstances" bearing on the right to appointment of counsel. As the state court decisions discussed below show, the "special circumstances" rule has only infrequently led the state courts to appoint counsel.[41] Some of the

[41] We wish to invite the attention of the Court to the excellent brief submitted in behalf of Amici, the American Civil Liberties Union and the Florida Civil Liberties Union, by J. Lee Rankin, Esq., and Professor Norman Dorsen. A draft of this brief has been furnished to counsel for Petitioner. The Amici point out that of

state decisions are startling. For example, in *Commonwealth ex rel. Simon* v. *Maroney*, 405 Pa. 562, 176 A. 2d 94 (1961), pet. for cert. pending, No. 41 Misc., Oct. Term, 1962, the defendant, an 18 year old boy, was sentenced in 1942 to a term of 20 to 40 years imprisonment following a conviction for rape, robbery, and assault and battery. The Pennsylvania Supreme Court recently denied relief. It felt that denial of counsel did not produce an "ingredient of unfairness" although the court recognized that "The defendant was not wholly a normal person . . . A behavior clinic study made of the defendant shortly after his arrest revealed him to be a high grade moron with an intelligence quotient of 59," equivalent to a "mental age of only nine." 405 Pa. at 565-67, 176 A. 2d at 96, 97. The defendant was "illiterate" (405 Pa. at 570, 176 A. 2d at 99), but the court felt no prejudice occurred because "There were no 'intricacies of criminal procedure,' no 'improper conduct on the part of the court or prosecuting officials,' and nothing complicated about the charges of robbery and rape." 405 Pa. at 565-66, 176 A. 2d at 96.

In *Butler* v. *Culver*, 111 So. 2d 35 (Fla. 1959), the court refused to set aside a conviction for second degree murder for which the defendant had been sentenced to life imprisonment, although there was a "showing in this record that approximately two months after the petitioner pleaded guilty to second degree murder [without counsel], it was formally al-

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139 decisions in state courts since *Betts* v. *Brady* on the question whether "special circumstances" required appointment of counsel, only 15 resulted in a finding that such circumstances existed. The Amici found no case in which a state trial court, seeing the possibility of unfairness, halted the proceeding in its midst so that counsel could be assigned.

judicated that he was suffering from an acute condition of insanity, described as paranoid schizophrenia." *Id.* at 37-38. The court said no contention was made on appeal that the accused was mentally incompetent at the time of trial.

In *Shaffer* v. *Warden*, 211 Md. 635, 126 A. 2d 573 (1956), the accused was convicted without counsel on charges of burglary. The accused contended that "he was only nineteen years of age and below the average in mental capacity and was suffering from a congenital speech defect." *Ibid.* The defendant maintained that as a result of his speech defect a plea of not guilty was mistaken as a plea of guilty; that he was unable because of his speech impediment to make the trial court understand the whereabouts of certain necessary witnesses; and that he vainly attempted to "stammer out" a request for appointment of counsel. 211 Md. at 636-37, 126 A. 2d at 573-74. The conviction was upheld.

The opinion of the Alabama Court of Appeals in *Artrip* v. *State*, 136 So. 2d 574 (Ct. App. Ala. 1962), reads in a similar vein. The court felt the following pertinent to its conclusion that petitioner was not prejudiced by denial of his request for counsel in a prosecution for escaping from the penitentiary:

> "Artrip was considered a good all round mechanic and electrician by his supervisor at the Kilby motor pool. His original brief was well typed and concisely stated a number of pertinent points. His supplemental briefs which exhibit good penmanship are also pertinent to the contentions he advances." *Id.* at 576.

Contrast with the foregoing cases the opinions of this Court in *Carnley* v. *Cochran*, 369 U.S. 506 (1962);

Chewning v. *Cunningham*, 368 U.S. 443 (1962); and *McNeal* v. *Culver*, 365 U.S. 109 (1961).

3. There is an inherent incongruity in the "special circumstances" test. The rule is invoked primarily after trial in connection with an appeal or a petition for habeas corpus. A defendant, who had no counsel at trial, must file a petition, without the assistance of counsel, alleging that he was denied due process by reason of the refusal to appoint counsel. We submit that it is highly unlikely that a layman knows what constitutes "special circumstances" within the meaning of the rule in *Betts* v. *Brady*, or that he has sufficient technical competence to allege these matters. If the accused lacked funds to retain counsel to defend him at trial, he will be unable to afford counsel once he is in prison. Thus, the factors which would justify invalidating the conviction may not be brought to the attention of the appellate court.

Even in the unlikely event that the accused has the assistance of counsel in preparing the documents on appeal, the prejudicial factors may not be adduced for the reason that the record does not reveal the "special circumstances." For example, the accused may be mentally retarded or mentally ill, but that fact may not be reflected in the record, although it would be a decisive factor under the rule of *Betts* v. *Brady*. See *McNeal* v. *Culver*, 365 U.S. 109 (1961); *Massey* v. *Moore*, 348 U.S. 105 (1954).

Denied qualified professional assistance at trial, the accused, confined in prison, tends to turn for legal advice to "jailhouse lawyers." The volume of post-conviction petitions in this and other courts and the assertion of important constitutional rights are thus

left, we surmise, largely to untrained, unqualified prisoners. Cf. *Schware* v. *Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring). It is ironic, but we believe true, that in final analysis, whether a post-conviction petition is filed, or whether a poverty-ridden prisoner gets a hearing on his right to counsel, may turn upon the quality of the fellow-inmate—usually equally untrained—who is the jailhouse lawyer.

4. The essentially post-trial character of the "special circumstances" rule is unfair to defendants in another respect: The accused may languish in prison for years before his conviction is adjudged to have been unfair by reason of the absence of counsel. The defendant in *Moore* v. *Michigan*, 355 U.S. 155 (1957), was sentenced in 1938 to "solitary confinement at hard labor for life"; in December, 1957, some 19 years later, this Court ruled that he had been denied his constitutional right to legal assistance. The lapse of time between trial and reversal for want of counsel was 15 years in *DeMeerleer* v. *Michigan*, 329 U.S. 663 (1947), and in *United States ex rel. Stoner* v. *Randolph*, 165 F. Supp. 284 (E.D. Ill. 1958); 14 years in *Garton* v. *Tinsley*, 171 F. Supp. 387 (D. Colo. 1959); and 10 years in *Uveges* v. *Pennsylvania*, 335 U.S. 437 (1948).

Indeed, a defendant may serve his entire sentence protesting throughout that his conviction is invalid by reason of the denial of counsel, and the case may be mooted before the wrong can be corrected. See *Parker* v. *Ellis*, 362 U.S. 574 (1960), writ of certiorari dismissed as moot, where four members of this Court agreed that the defendant "was convicted of a felony in flagrant disregard of his constitutional right to as-

sistance of counsel" after a trial characterized as a "sham." *Id.* at 577-578 (Warren, C. J., dissenting).

5. The long periods of delay associated with *Betts* v *Brady* are undesirable for the state as well as for the defendant. If the conviction is invalidated it may be difficult, if not impossible, to conduct a new trial years later. Witnesses may have died; records may have been lost; memories will have faded. In short, we respectfully submit that it is to the advantage of the state, as well as to the defendant, to furnish counsel to indigent persons at all trials for serious offenses.

IV. THE RIGHT TO COUNSEL MINIMALLY INCLUDES APPOINTMENT OF AN ATTORNEY TO ASSIST AN INDIGENT PERSON AT THE TRIAL OF A SERIOUS OFFENSE

It is, of course, unnecessary in deciding the present case to delineate all of the metes and bounds of the right to counsel in state criminal proceedings. This case involves the right of an accused to legal assistance at the trial stage of the prosecution. Whatever the perimeter of the right, it surely comprehends the assignment of counsel at the trial on the merits.

We believe the right of indigents to legal assistance should be commensurate with that of persons who have means to employ counsel. An accused person who desires to consult an attorney should have the right to do so at any time immediately after arrest.[42] Indeed, "there is a strong argument that the time a defendant

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[42] The District of Columbia Legal Aid Act provides that the court "will make every reasonable effort to provide assignment of counsel as early in the proceeding as practicable." D. C. Code Anno. § 2-2202 (1961 ed.). See also Beaney, *Right to Counsel Before Arraignment*, 45 Minn. L. Rev. 771, 780-81 (1961); *Crooker v. California*, 357 U.S. 433, 448 (1958) (Douglas, J., dissenting); *White v. Maryland*, No. 600 Misc., Oct. Term, 1962 (pet. for cert. granted, Nov. 19, 1962).

needs counsel most is immediately after his arrest and until trial.'" Ass'n. of Bar of City of New York, et al., *Equal Justice for the Accused* 60 (1959). In any event, counsel should be furnished to destitute defendants at the same point in time at which an accused person with funds would be entitled under the 14th Amendment to consult an attorney.[42]

V. THE PRACTICAL IMPLICATIONS WITH RESPECT TO PERSONS ALREADY IMPRISONED DO NOT MILITATE AGAINST OVERRULING BETTS v. BRADY

Finally, a word should be said about the contention that *Betts* v. *Brady* should not be overruled because it may result in releasing indeterminate numbers of prisoners in some states. See *Foster* v. *Illinois*, 332 U.S. 134, 139 (1947).

First, it must be noted that a defendant who obtains a reversal of his conviction may be retried for the offense of which he was convicted. See *Green* v. *United States*, 355 U.S. 184, 189 (1957); *id.* at 219 (Frankfurter, J., dissenting). Moreover, it is possible that an even more severe sentence than that originally levied may be imposed at the conclusion of the second trial. See *Robinson* v. *Johnston*, 50 F. Supp. 774 (N.D. Cal. 1943); *Robinson* v. *United States*, 324 U.S. 282 (1945) (defendant sentenced to life imprisonment suc-

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[42] With respect to the scope of the right, it is pertinent to note that the 6th Amendment reads, in part, that "*In all criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense." (emphasis supplied) This Court has held that the right to trial by jury secured by this provision does not extend to "petty" offenses. *District of Columbia* v. *Clawans*, 300 U.S. 617 (1937); see Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917 (1926); 18 U.S.C. § 1.

cessfully attacked conviction for failure to appoint counsel; following retrial, he was sentenced to death for the same offense).[11]

Second, the claim that some offenders would go free was urged in opposition to the decisions in *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Griffin v. Illinois*, 351 U.S. 12 (1956). In both cases, this Court brushed aside that consideration. The practical implications of the ruling in *Mapp* are in some respects more drastic than the ruling sought here. As a consequence of *Mapp*, illegally obtained evidence cannot be used; the prosecution may be completely disarmed. But no comparable handicap will be imposed upon the prosecution by reversal of *Betts v. Brady*. Further, the claims of the Petitioner here are stronger than those of the petitioner in *Griffin*. *Griffin* involved the rights of a *convicted person* seeking equality of treatment in connection with an appeal; as the Court pointed out in that case, there is no constitutional right to an appeal. 351 U.S. at 18. The present case, however, involves the rights of persons presumed to be innocent who are seeking meaningful protection of their right to a fair trial, a right which *is* safeguarded by the Constitution.

Thirty years have passed since the Court, in *Powell v. Alabama*, *supra*, spoke of the necessity for appointment of counsel by the states. The states have had adequate notice and ample time to conform their practice to the requirements of a constitutional imperative. As Mr. Justice Clark stated in *Mapp v. Ohio*, *supra*, "further delay in reaching the present

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[11] The sentence was subsequently commuted. See note, Hall and Glueck, *Cases on Criminal Law and Its Enforcement* 504 (1958).

result could have no effect other than to compound the difficulties" in the future. 367 U.S. at 659, n. 9.[45]

CONCLUSION

In 1942, shortly after *Betts* v. *Brady* was announced, the present Dean of the Harvard Law School, Erwin N. Griswold, and Benjamin Cohen, Esquire, expressed their protest against that decision in words which, we feel, have been underscored by the passage of time:

> "[A]t a critical period in world history, *Betts* v. *Brady* dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right to counsel to defend him. The right of counsel, for the poor as well as the rich, is an indispensable safeguard of freedom and justice under law." (N.Y. Times, Aug. 2, 1942, IV, p. 6, col. 5, quoted in *Bute* v. *Illinois*, 333 U.S. 640, 677, n. 1 (1948) (Douglas, J., dissenting)).

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[45] It has been suggested that a decision overruling a point of constitutional law should be given only prospective effect in certain instances. See *Griffin* v. *Illinois*, 351 U.S. 12, *25-26 (1956) (Frankfurter, J., concurring). We do not advocate that result. We respectfully submit that it would blur the distinction between the legislative and judicial functions and that it would present substantial questions in connection with the requirement of U.S. Const., Art. III, § 2, that this Court sits to decide "cases" and "controversies."

The ruling in *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), was given retroactive effect. See *Robinson* v. *Johnston*, 50 F. Supp. 774 (N.D. Cal. 1943). Similarly, in *Eskridge* v. *Washington Prison Bd.*, 357 U.S. 214 (1958), this Court held that the principle of *Griffin* v. *Illinois*, *supra*, decided in 1956, was applicable to a 1935 conviction.

For the reasons stated, *Betts* v. *Brady* should be overruled, and the judgment of the Court below should be reversed.

Respectfully submitted,

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* Counsel for Petitioner wishes to acknowledge the valuable assistance rendered in connection with this brief by John Hart Ely, a third year student at the Yale Law School, New Haven, Connecticut.

APPENDIX A

Constitutional Provisions and Statutes Involved

U. S. Const., Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Statutes, Section 810.05 (1961):

> "Whoever breaks and enters or enters without breaking any dwelling or store house, or any building, ship, vessel, or railroad car with intent to commit a misdemeanor, shall be punished by imprisonment in the state prison or county jail not exceeding five years, or by fine not exceeding five hundred dollars."

Florida Constitution, Declaration of Rights, Section 11:

> "In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him."

Florida Statutes, Section 909.21 (1961):

> "In all capital cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant

as he shall deem necessary, and shall allow such compensation as he may deem reasonable, such sum to be paid by the county in which the crime was committed. Counsel, so appointed, may in the event of conviction and sentence of death, appeal the case to the supreme court, and prosecute said appeal to its final conclusion with diligence; and until the supreme court has disposed of the appeal, no compensation shall be allowed to such counsel. If counsel first appointed is unable, for any reason, to perfect and prosecute the appeal, the court may relieve him from such duty, but shall appoint other counsel for such purpose. When counsel so appointed by the court, in capital cases, completes the duties imposed by this section, such counsel shall file a written report as to the duties performed by him and apply for discharge by the court.

"The compensation of counsel for the defendant, at the trial, shall not exceed five hundred dollars; and defendant's counsel's compensation on appeal, shall not exceed five hundred dollars additional."

APPENDIX B

In the Present Case, Petitioner Did Not Receive the Benefits and Protection Which Would Have Been Afforded Him By Counsel

The present case discloses the following specific consequences of the denial of counsel:

1. The offense of breaking and entering with intent to commit a misdemeanor raises a number of subtle and complex questions which were not explored at the trial. See *McNair v. State*, 61 Fla. 35, 55 So. 401 (1911). The trial judge did not explain the elements of the offense to the jury; he merely paraphrased the charge set out in the information (R. 43; see R. 1).

An individual may be so intoxicated as to negative the intent requisite for a conviction of this offense. *Jenkins*

v. *State*, 58 Fla. 62, 66, 50 So. 582, 583 (1909). The principal witness for the state, who stated that he saw Gideon leave the Bay Harbor Poolroom at 5:30 a.m., testified that Gideon "acted kinder drunk" (R. 21). However, the jury was not instructed with respect to the implications of intoxication as a defense.

The accused was not informed of his right to make requests concerning the charge and to be advised of the court's rulings with respect to the requests before final argument.

2. In connection with the *voir dire*, the trial judge advised Gideon that all or any one of the jurors could be excused "if you don't like their looks" (R. 11), but he did not advise Gideon of his right to examine the prospective jurors individually or of his right to object to a juror for cause. See *Carnley* v. *Cochran*, 369 U.S. 506 (1962) (Douglas, J., concurring).

3. The judge improperly cut off cross-examination in several instances. Thus, he did not permit Gideon to inquire into the proprietor's pattern of conduct in locking the building (R. 15), an inquiry which the Florida Supreme Court has held to be proper in a prosecution for this offense. *Adkinson* v. *State*, 48 Fla. 1, 37 So. 522 (1904).

4. No objection was interposed in behalf of the defendant to opinion and hearsay testimony. See e.g., R. 14, A-6; R. 23, A-2.

5. The record shows that after the verdict was returned "Imposition of sentence was withheld pending receipt of an investigative report of defendant's past history." (R. 4.) Three weeks later, the defendant, "having nothing to say," was sentenced to the maximum prison term authorized by the governing statute, a term of five years (R. 5). No plea was apparently made against imposition of the maximum penalty.

APPENDIX C

The Court-Martial Cases and Rejection of the Distinction Between Capital and Non-Capital Offenses As a Constitutional Standard In Those Cases

In the October Term, 1955, this Court held that civilian dependents of American servicemen could constitutionally be tried by a military court-martial in a foreign country for an offense committed in that country. *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956). Each of these cases involved a charge of premeditated murder, an offense punishable by death. The Court, in an opinion by Mr. Justice Clark, rejected the contention that trial by court-martial in these circumstances violated Art. III, § 2, and the Sixth Amendment, particularly the guarantee of the right to trial by jury. Mr. Justice Frankfurter reserved the expression of his views (351 U.S. at 481, 492). The Chief Justice and Mr. Justice Black and Mr. Justice Douglas dissented and indicated they would file a statement of their views the following term (351 U.S. at 486, 492).

Subsequently, the Court granted a petition for rehearing, and after further argument the previously rendered decisions were set aside on the grounds that the petitioners could not constitutionally be tried by military authorities. *Reid v. Covert*, 354 U.S. 1 (1957). Mr. Justice Black, in an opinion in which the Chief Justice and Justices Douglas and Brennan concurred, concluded that the court-martial proceedings did not satisfy the constitutional guarantee of trial by jury in a court of law and in accord with traditional modes of procedure after an indictment by a grand jury. The Court held that the power of Congress under Art. I, § 8, cl. 14, "To make Rules for the Government and Regulation of the land and naval Forces" did not extend to persons of petitioners' status, that is, to civilian dependents.

Mr. Justice Frankfurter, concurring in a separate opinion, "conclude[d] that in capital cases, the exercise of

court-martial jurisdiction over civilian dependents in time of peace cannot be justified by Article I, considered in connection with the specific protections of Article III and the Fifth and Sixth Amendments." 354 U.S. at 49. Mr. Justice Harlan also concurred separately "on the narrow ground that where the offense is capital, Article 2(11) cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces overseas in times of peace." 354 U.S. at 65. He alluded specifically to *Betts* v. *Brady* and the cases relating to the right to counsel under the 14th Amendment in support of the position that "run of the mill offenses" should be treated differently from capital cases. *Id.* at 75, 77.

Mr. Justice Clark dissented in an opinion which Mr. Justice Burton joined (354 U.S. at 78). They were of the view that trial by court-martial in the circumstances presented was reasonably related to Congressional power over the land and naval forces under Art. I, § 8, cl. 14. The dissenting Justices could "find no distinction in the Constitution between capital and other cases," and they pointed out that "at argument all parties admitted there could be no valid difference." 354 U.S. at 89.

Mr. Justice Whittaker did not participate in the decision.

Three years later, in *Kinsella* v. *United States ex rel Singleton*, 361 U.S. 234 (1960), the Court held that the decision in *Reid* v. *Covert*, 354 U.S. 1 (1957), was applicable to non-capital crimes as well as to capital offenses, that is, civilian dependents can not be tried by court-martial. Mr. Justice Clark, who had dissented in *Reid* v. *Covert*, wrote the opinion of the Court and spoke for the Chief Justice, Justices Black, Douglas, Brennan, and himself. The Court rejected the contention that constitutional and practical considerations justified different treatment of offenders charged with non-capital offenses. Mr. Justice Whittaker, with whom Mr. Justice Stewart joined, concurred in the judgment with respect to dependents of servicemen (as

distinguished from civilians employed by the military). They stated that they could "see no constitutional distinction between Congress' power to provide for the court-martial punishment of capital offenses, on the one hand, and non-capital offenses on the other hand . . ." 361 U.S. at 264. Justice Harlan, joined by Justice Frankfurter, dissented on the grounds that non-capital offenses were involved.

Seven Justices of the Court, in these cases, thus rejected the difference between capital and non-capital offenses as controlling in relation to rights protected by Article III and the Fifth and Sixth Amendments.

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1962

No. 155

CLARENCE EARL GIDEON,
Petitioner,

vs.

H. G. COCHRAN, JR., Director, Division of Corrections,
Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE FLORIDA CIVIL LIBERTIES UNION, *AMICI CURIAE*

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CONGRESSIONAL MATERIAL:

H. R. Rep. No. 1293, 85th Cong., 2d Sess. 31n

Hearings Before the Subcommittee on the Study of Representation of Indigent Defendants in Federal Criminal Cases of the House Committee on the Judiciary, 83rd Cong., 2d Sess. 36

Hearings on H. R. 5649 before Subcommittee No. 3 of the Committee of the Judiciary, House of Representatives, 84th Cong., 1st Sess. 32n

MISCELLANEOUS:

Administrative Office of the U. S. Courts Ann. Rep. printed in U. S. Judicial Conference Ann. Rep. 31n

Beaney, The Right to Counsel in American Courts (1955) 13

Brownell, A Decade of Progress: Legal Aid & Defender Services, 47 A.B.A.J. 867 (1961) 36

Dorsen, The Rich, the Poor, and Equal Justice, The Village Voice, July 19, 1962 ..... 26n

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Equal Justice for the Accused (1959) 15, 29, 34, 35, 36

Kennedy, Address before the House of Delegates American Bar Association 34n

Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315 (1961) 20, 30, 32

Reitz, Federal Habeas Corpus: Post Conviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461 (1960) 30, 32

Ritz, Twenty-five Years of State Criminal Confession Cases in the U. S. Supreme Court, 19 Washington & Lee L. Rev. 35 (1962) 16

Rodak & Spaniol, Preliminary Report of a Study of the Dockets of the Supreme Court of the United States in Relation to Federal Habeas Corpus Jurisdiction (March 1959, unpublished) 31n

Story, Life and Letters of Joseph Story (1851) .. 23, 24

The Legal Air Brief Case (1956) (No. 2) 60 37

Trebach, A Modern Defender System for New Jersey, 12 Rutgers L. Rev. 289 35

Supreme Court of the United States

October Term, 1962

No. 155

CLARENCE EARL GIDEON,

Petitioner,

vs.

H. G. COCHRAN, JR., Director, Division of Corrections,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE FLORIDA CIVIL LIBERTIES UNION, *AMICI CURIAE*.

Interest of *Amici*.

The American Civil Liberties Union is a nationwide, non-partisan organization engaged solely in the defense of the Bill of Rights. Freedom of speech, due process of law, and the equal protection of the laws have been the Union's traditional concern.

This brief, filed with the consent of the parties, urges the Court to discard the doctrine of *Betts* v. *Brady*, 316 U. S. 455 (1942), as being out of harmony with the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The American Civil Liberties Union has asserted for many years that the Fourteenth Amendment can be satisfied only if the states are obliged in all cases to provide counsel for those persons accused of crime who are financially unable to retain counsel privately. Our brief sets forth the detailed bases on which that assertion rests.

Question Presented

Whether this Court's holding in *Betts* v. *Brady* should be reconsidered.

Statement of the Case

On June 19, 1961, the State of Florida charged petitioner, under an information, with the crime of feloniously breaking and entering a building with the intent to commit a misdemeanor (R. 1). On July 31, 1961, petitioner entered a plea of not guilty (R. 3). On August 4, 1961, the day of trial, petitioner asked that the court appoint counsel to represent him at trial. In denying the request, the trial court said,

> "Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense • • • " (R. 9).

The trial proceeded with petitioner acting as his own attorney. The jury brought in a verdict of guilty (R. 4) and petitioner was sentenced to imprisonment for five years (R. 5).

Petitioner filed a petition for a writ of habeas corpus in the Supreme Court of Florida on October 11, 1961 (R. 44-46). The petition alleged that petitioner was "a pauper without funds or any possibility of obtaining financial aid" (R. 45), and that the failure of the trial court to appoint counsel to represent him violated the Fourth, Fifth and Fourteenth Amendments (R. 46). The writ was denied on October 30, 1961 (R. 47). A writ of certiorari to the Supreme Court of Florida was granted on June 4, 1962 (R. 47).

Summary of Argument

The issue raised in this case was originally presented to this Court twenty years ago in the case of *Betts* v. *Brady*, 316 U. S. 455 (1942). Instead of requiring the appointment of counsel for all indigent criminal defendants, the Court in *Betts* ruled that only in capital cases was appointment of counsel to be required. In noncapital cases counsel was to be appointed only if "special circumstances" indicated that a trial without defense counsel would be unfair. The "special circumstances" rule has plagued both state and federal courts to the present day; it has operated neither to protect the rights of the accused nor to facilitate the sound and impartial administration of justice.

I

Despite the existence of the "special circumstances" rule, counsel is rarely appointed in noncapital cases, even if requested. Among cases in which no "special circumstances" were found and in which there was no review are many which have run counter to prior decisions of this Court. This unwillingness by state courts to appoint counsel has led to the conviction of apparently innocent defendants.

Even if a trial judge in a state criminal proceeding attempts in good faith to ascertain whether counsel should be appointed, he will have a difficult task because of the confusing and contradictory criteria that have been propounded over the years. Moreover, no judge can actually predict the course of a trial. Numerous decisions must be made in every trial, all or most of which are too difficult for any defendant without a lawyer at his side. These difficulties are compounded by the increasing complexity of the criminal law.

When the trial proves to be unfair, appeal or collateral attack are usually the only remedies open to the defendant. But these remedies at most afford the defendant a second chance for a fair trial if he can prove the first unfair. And the second chance occurs only after the lapse of many years during which he has been confined in prison.

II

One of the basic elements of due process is the right to a hearing. Because of the nature of our adversary system, the right to a hearing is of little value without the right to be heard by counsel. Despite this fact, the Court in *Betts* v. *Brady* drew a distinction between appointment of counsel in capital cases and noncapital cases. This distinction has no warrant in the language of the Constitution, in logic or in history. In other contexts this Court has refused to countenance the distinction between capital and noncapital crimes, and should similarly expunge the unjustified distinction in the present case.

In similar fashion, the rule evolved from *Betts* v. *Brady* creates an invidious distinction with respect to the quality of justice afforded the rich and the poor. If justice is to be equal and accessible for all, an opportunity must be provided for all accused, irrespective of their means, to have the assistance of counsel.

III

The "special circumstances" rule has congested both state and federal court dockets with complicated and time-consuming cases. Requiring the appointment of counsel for all indigent defendants would limit the grounds for appeal and collateral attack of state criminal convictions, overcome perplexing problems of judicial administra-

tion, and lessen the abrasive effect that the exercise of the federal habeas corpus jurisdiction has had upon state systems of criminal justice.

IV

Requiring the appointment of counsel will lead to substantial savings to society. The burden on the judiciary and prosecution from postconviction proceedings will be eased; delays in the administration of justice will be eliminated; and the cost of detention will be reduced. In addition, the expense of providing adequate representation to indigent defendants will be reasonable. Four basic systems of representation have been developed—assigned counsel, the voluntary defender, the public defender, and the mixed private-public system. The success of these systems in the states now employing them strongly suggests their similar success in the states which do not now provide legal assistance to indigents.

V

In *Mapp* v. *Ohio*, 367 U. S. 643 (1961), this Court held that the Fourteenth Amendment incorporated from the Fourth Amendment not only the abstract right to be free from unreasonable searches and seizures, but also the rule requiring the exclusion of evidence so seized. The constitutional development of the exclusionary rule is a compelling historical model for this Court to follow in ruling that the Fourteenth Amendment incorporates from the Sixth Amendment not only the abstract right to counsel, but also the rule applicable in federal courts under the Sixth Amendment requiring appointment of counsel in all cases where the indigent defendant is unable to secure the services of an attorney and has not competently waived his right to counsel.

ARGUMENT

Introduction

The issue presented in this case is whether the Fourteenth Amendment requires a State to furnish counsel to an indigent defendant in every criminal case in which he has not intelligently and competently waived the right to legal assistance.

Twenty years ago, the identical issue was presented in *Betts* v. *Brady*, 316 U. S. 455 (1942). The rule developed by the Court in *Betts* has plagued both federal and state courts to the present day. Under that rule, appointment of counsel is required in capital cases (see *Bute* v. *Illinois*, 333 U. S. 640, 676 (1948)), but in noncapital cases state courts may deny counsel, even upon request of the defendant, unless such denial would constitute a "denial of fundamental fairness, shocking to the universal sense of justice" (*Betts* v. *Brady*, *supra*, 316 U S. at 462), or unless there are "special circumstances showing that without a lawyer a defendant could not have an adequate and fair defense" (*Palmer* v. *Ashe* 342 U. S. 134, 135 (1951)).

The *amici* believe that the Due Process and Equal Protection Clauses accord to every criminal defendant in this country a right to legal assistance at trial. Hence, no defendant may be denied a lawyer unless he intelligently and competently waives this right.

The "special circumstance" rule enunciated in *Betts* has been a failure. It was illegitimate at its inception because it was based on a distinction between capital and noncapital crimes that had no warrant in the Constitution or in prior decisions of this Court. The rule has operated neither to protect the rights of those accused of crime nor to facilitate the sound and impartial administration of justice. It has, moreover, led to a spate of unjust results in state criminal cases, and perhaps worst of all, it has drawn and perpetuated an invidious line between the con-

stitutional protections accorded the rich and those accorded the poor. The "special circumstances" rule of *Betts* v. *Brady* is therefore incompatible with the Due Process and Equal Protection Clauses.

Due process is a standard of basic fairness which does not admit of precise definition. In *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), Justice Cardozo described it as including all that is "implicit in the concept of ordered liberty." Or, as the Court said in *Powell* v. *Alabama*, 287 U. S. 45, 67 (1932), with specific reference to the right to counsel, the question is whether

> "[T]he right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' . . . ."

Applying this broad language, the Court has employed various methods of analysis for determining whether any particular practice violates the Due Process Clause. One way of analyzing "due process" is to examine the effect upon the individual defendant to determine whether the practice is fundamentally unfair or shocking to the conscience. Another is to measure the challenged practice against contemporary community standards. Finally, "due process" may be viewed as incorporating a set of specific guarantees, including the right to a hearing and the right to be free from invidious discriminations between classes of persons. By any of these standards, as this brief will demonstrate, every criminal defendant has a right to counsel in every case.

I

Denial of counsel to criminal defendants is fundamentally unfair.

The fundamental unfairness of a rule which permits a state to deny counsel to criminal defendants can best be illustrated by considering how the rule operates in practice from the commencement of the trial to the period after trial when the defendant tries to avail himself of post-conviction remedies. The unfairness is compounded in practice by the inequities and uncertainties of the "special circumstances" rule. These inequities and uncertainties can be eliminated only by an objective rule requiring appointment of counsel in every case.

A. The Cases Decided Since *Betts* v. *Brady* Demonstrate That Legal Assistance Is Improperly Denied to Many Defendants Entitled to Counsel under the "Special Circumstances" Rule.

The cases decided in this Court since *Betts* v. *Brady* that have dealt with a state court's application of the "special circumstances" rule reveal that even though governing decisions of this Court clearly indicated the defendant's right to legal assistance, a defendant may not be informed of his right to counsel, never request counsel, and never have one appointed. See *Uveges* v. *Pennsylvania*, 335 U. S. 437 (1948).

Other cases disclose that even where the defendant requests appointment of counsel, the trial judge may deny the request without further inquiry. Thus, in the instant case the following colloquy took place (R. 9):

> "The Defendant: Your Honor, I said: I request this Court to appoint Counsel to represent me in this trial.
>
> The Court: Mr. Gideon, I am sorry, but I cannot

> appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case."

Assistance of counsel has also been denied even though it was clear that appointment was necessary in view of the defendant's age, mental condition and education, the complex nature of the charge, and the likelihood that the trial would be unfair under all circumstances. Thus, in *Moore v. Michigan*, 355 U. S. 155 (1957), the petitioner, a 17 year old Negro with a 7th grade education and possible mental defects, was arrested for the murder of an elderly lady. The petitioner was questioned for two days until he orally confessed. The next morning he was arraigned. Without counsel to assist him, he pleaded guilty, was adjudged guilty of murder in the first degree, sentenced to life imprisonment, and transferred to prison immediately. Similarly, in *DeMeerleer v. Michigan*, 329 U.S. 663 (1947), the petitioner, also 17 years of age, was charged with murder, arraigned, tried, convicted, and sentenced to life imprisonment all on the same day. He was without legal assistance throughout these proceedings and was never advised of his right to counsel.

Among the state court cases in which no special circumstances were found and which were not reviewed here are many which run counter to prior decisions of this Court. See Appendix II, pp. 48-49, *infra*. The defendants in these cases should have had counsel appointed as soon as their age, education and mental condition were made apparent to the state court.

Thus, in *Shaffer v. Warden, Maryland House of Correction*, 211 Md. 635, 126 A. 2d 573 (1956), it was held that a 19 year old defendant, of below average mental capacity and with a congenital speech defect, was not deprived of due process in being required to plead to an indictment for

burglary. His claim that he had in fact pleaded "not guilty" but was misunderstood by the trial court was rejected by the state appellate courts. Compare this Court's ruling in *Uveges* v. *Pennsylvania, supra*, which was not referred to by the state court. In *Commonwealth ex rel Ringer* v. *Maroney*, 177 Pa. Super. 509, 110 A. 2d 801 (1955), *cert. denied*, 350 U. S. 916 (1956), an illiterate moron with only a third grade education was convicted of arson without benefit of counsel. Compare this Court's ruling in *Palmer* v. *Ashe, supra*, which was not referred to by the Pennsylvania Supreme Court. See also *Butler v. Culver*, 111 So. 2d 35 (Fla. 1959); *Fisher* v. *State*, 11 So. 2d 806 (Miss. 1943). And see *Commonwealth ex rel Simon* v. *Maroney*, 195 Pa. Super. 613, 171 A. 2d 889 (1961) *petition for certiorari pending*, in which the defendant, aged 18, with an I.Q. of 59 and almost no education, was convicted of rape and robbery without benefit of counsel.

The unwillingness of state courts to appoint counsel can often lead to the conviction of apparently innocent defendants. Thus, in *Parker* v. *Ellis*, 362 U. S. 574 (1960), a 67 year old man was convicted of forgery in a Texas court without the assistance of counsel and was sentenced to 7 years imprisonment. His repeated attempts to obtain release through collateral proceedings were unsuccessful. Finally, a petition for certiorari was granted by this Court. It was subsequently dismissed as moot when it appeared that the petitioner had been released from prison after serving five years. The critical facts are contained in the dissenting opinion of the Chief Justice (362 U. S. at 578-79):

> "[His] trial was a sham. Although the testimony directly bearing on the issue of forgery was not strong [since the woman on whose account the check was drawn was never called as a witness], petitioner's conviction is hardly surprising, for the prosecution's case consisted in large part of a potent melange of assorted types of inadmissible evidence

> —introduced without objection by petitioner. But petitioner suffered as much from errors of omission as he did from errors of commission. Petitioner now alleges—and respondent does not deny—that the victim of the alleged forgery was petitioner's mother-in-law and that the principal prosecution witness was his brother-in-law, a 'bitter enemy'; but petitioner introduced no evidence to this effect at the trial. Nor is this strange, for petitioner's halting attempts to defend himself discloses utter ineptness in the courtroom."

Similarly, in *Pennsylvania ex rel Herman v. Claudy*, 350 U. S. 116 (1956), the petitioner, 21 years of age with only six years of schooling, pleaded guilty without assistance of counsel to 8 charges of burglary, 12 charges of larceny, 8 of forgery and 2 of false pretense. He was sentenced to 17½ to 35 years. This Court ordered hearings on a petition for habeas corpus which alleged that after his arrest the petitioner had been held incommunicado for three days, during which time a "state trooper grabbed him by the neck and threatened to choke him if he did not confess." It was also claimed that "there were threats against the safety of his wife and daughter", and that when the assisting prosecuting attorney demanded that he sign a plea of guilty to all charges, and the petitioner asked what he was signing, he was told "sign your name and forget it" (350 U. S. at 119). See also *Palmer v. Ashe, supra.*

B. The "Special Circumstances" Rule Has Developed Such Contradictions and Inconsistencies that It Provides No Proper Guidance to Lower Courts Attempting to Apply It Fairly.

Even if a trial judge in a state criminal case attempts in good faith to ascertain whether counsel should be appointed because of "special circumstances", he will find the criteria for decision laid down by this Court are confusing and contradictory and do not permit even-handed

and fair application of the rule. As the Attorney General of Pennsylvania said in his brief before this Court (p. 40) in *Gibbs* v. *Burke*, 337 U. S. 773 (1949):

> "The practical effect upon local administrative law of the decisions which interpret the Fourteenth Amendment cannot be minimized. No state court should be required to guess in advance of the time when a case is called for trial whether the matter coming before it is of such character that the appointment of counsel is demanded. As a practical matter it cannot be done."[1]

The "capriciousness" of the standard for appointment of counsel may be seen in "the records of the right-to-counsel cases since *Betts* v. *Brady* in both state and federal courts. * * *" *Carnley* v. *Cochran*, 369 U. S. 506, 519 (1962) (Black, J. concurring). Thus, although in *DeMeerleer* v. *Michigan, supra*, and in *Uveges* v. *Pennsylvania, supra*, the Court noted that a defendant's age was a crucial criterion, in *Gayes* v. *New York*, 332 U. S. 145 (1947), and in *Canizio* v. *New York*, 327 U. S. 82 (1946), the failure to appoint counsel at trial was upheld even though the defendants were 16 and 19 years old, respectively.

Similarly, in *Foster* v. *Illinois*, 332 U. S. 134 (1947), the defendants, without benefit of counsel, were arraigned and sentenced after a plea of guilty all on the same day. This Court found that the defendants understood the effect of their plea and thus waived their right to counsel. Yet in the same year, in *DeMeerleer* v. *Michigan, supra*, virtually the same fact situation produced a reversal and new trial. A comparable inconsistency is revealed in this Court's treatment of habitual offender statutes. Compare

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[1] See *Raymond* v. *State*, 192 Md. 602, 611, 65 A. 2d 285, 288-89 (1949), in which the court noted that recent decisions of this Court "have not dispelled the confusion" concerning the appointment of counsel.

Gryger v. *Burke*, 334 U. S. 728 (1948), with *Chewning* v. *Cunningham*, 368 U. S. 443 (1962).

The very factors to be considered often seem contradictory. Thus in *Gryger* v. *Burke*, *supra*, and in *Quicksall* v. *Michigan*, 339 U. S. 660 (1950), the prior experience of the defendants in the criminal courts was weighed *against* their right to have counsel appointed. See also *Betts* v. *Brady*, *supra*, 316 U. S. at 472. However, this Court has recently indicated that prior convictions are to be considered *in support of* a claim to be represented by counsel because a defendant is placed in a quandary whether to testify on his own behalf and thereby risk the possibility that his criminal record will be brought out on cross-examination or, on the other hand, to remain silent and thereby risk a negative inference of guilt. See *Carnley* v. *Cochran*, *supra*, 369 U. S. at 511. Counsel is necessary to assist him in making this decision.

If the same factor has been weighed both for and against a defendant's right to counsel by this Court, surely the difficulties experienced by the lower state and federal courts in attempting to decide whether the appointment of counsel is required are understandable. See Beaney, *The Right to Counsel in American Courts*, 194-95 (1955).

C. The Complex and Unpredictable Course of Criminal Trials Further Demonstrates the Unfairness of Denying Any Defendant the Assistance of Counsel.

Even if trial judges scrupulously attempted to apply the "special circumstances" rule, and even if the criteria for the application of that rule were not contradictory, the rule would in many cases operate unfairly to indigent defendants. It is not possible to predict the actual course of a criminal trial or the defendant's response to a novel, confusing and harrowing experience—acting as his own lawyer in defense of his liberty against the efforts of an experienced prosecutor to convict him.

The difficulties experienced by the unassisted defendant were recognized in *Powell* v. *Alabama, supra*, 287 U. S. at 69:

> "Even the intelligent and the educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence which is irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."

Some idea of the burden on the defendant unaided by counsel can be obtained by following him through a trial and considering the enormous number of difficult legal decisions he has to make.

After an indictment is returned, should the indigent defendant challenge the indictment because it does not allege the essential elements of the crime or because it contains prejudicial material or because the grand jury was not properly impaneled? Should he request a bill of particulars or a list of witnesses from the prosecution? Should he object to the venue of trial because of inflammatory feeling in the community or because the crime was not committed within the jurisdiction? Should he attack the empaneling of the petit jury because of exclusion of certain racial groups from the lists or, if not, which jurors should he challenge for cause or peremptorily?

At trial many other difficult decisions must be made. When the prosecution presents its case, should the defendant move to exclude any evidence because it was illegally seized or obtained by wiretapping or eavesdropping? Should he object to hearsay evidence or protest

the competency of any prosecution witnesses? Which of these witnesses should he cross-examine or try to impeach and on what basis? Should he take the stand himself and risk exposure of a prior criminal record or remain silent and run the risk that a jury will infer guilt from his failure to testify? Should he raise a defense of insanity and, if so, what must he prove? Should he object to the judge's instructions to the jury? If he is found guilty, how can he reverse the jury's verdict? How should he perfect his appeal and what papers must be filed or exceptions taken to preserve legal points on appeal?

That these decisions are too much for any defendant without a lawyer at his side was recognized by the Association of the Bar of the City of New York in its special study on *Equal Justice for the Accused*, 35 (1959):

> "Decisions may have to be taken as to whether it is advisable to request permission to appear before the grand jury; whether the indictment or information should be tested by a preliminary motion; and whether the accused should go to trial or offer to plead, perhaps to a lesser charge. If it is decided that the case is to be tried, counsel must undertake the complex of activities entailed in preparing for and conducting the defense. This may involve consideration of the advisability of waiving jury trial, the preparation of legal arguments, the search for witnesses, the cross-examination of the prosecution's witnesses, and a decision as to whether to put the accused on the stand."

The difficulties imposed on the defendant in making each of the above decisions, any one of which could spell the difference between conviction and acquittal, are compounded by the increasing complexity of substantive and procedural criminal law. The common law crimes are giving way to modern codifications; new crimes unheard of in a less advanced technological setting have been enacted; the impact of science on crime detection has revolutionized the law of evidence; and the protections of the

accused against improper police methods, which were still embryonic in 1942 when *Betts* v. *Brady* was decided, have become one of the principal and most complex features of the criminal process.

The obstacles placed before a man without a lawyer are accentuated by recently recognized defenses based upon the Constitution. Thus, convictions unsupported by evidence are invalid under the Due Process Clause of the Fourteenth Amendment. *Thompson* v. *City of Louisville*, 362 U. S. 199 (1960). The Cruel and Unusual Punishment Clause has been infused with new vigor. *Robinson* v. *California*, 370 U. S. 660 (1962). The defendant's right to testify and be cross-examined has been reaffirmed. *Ferguson* v. *Georgia*, 365 U. S. 570 (1961). And defenses relating to double jeopardy (see *Bartkus* v. *Illinois*, 359 U. S. 121 (1959)) and "immunity" statutes (see *Ullmann* v. *United States*, 350 U. S. 422 (1956); *Knapp* v. *Schweitzer*, 357 U. S. 371 (1958)), are in uncertain flux.

Increasingly intricate evidentiary rules—many being outgrowths of judicial attempts to control police conduct—illustrate further the need for a lawyer. Thus, although the leading case requiring exclusion of a coerced confession (*Brown* v. *Mississippi*, 297 U. S. 278 (1936)) was decided only six years prior to *Betts* v. *Brady*, the law relating to confessions has developed rapidly since *Betts* both under the Due Process Clause and under state law. See Ritz, *Twenty-Five Years of State Criminal Confession Cases in the U. S. Supreme Court*, 19 Washington & Lee L. Rev. 35 (1962). Analogous problems are presented by *Rochin* v. *California*, 342 U. S. 165 (1952) and *Breithaupt* v. *Abram*, 352 U. S. 432 (1957). And efforts by state police to hold defendants incommunicado after arrest present difficult questions under state law as well as the Federal Constitution. See *Culombe* v. *Connecticut*, 367 U. S. 568 (1961); *Crooker* v. *California*, 357 U. S. 433 (1958); cf. *McNabb* v. *United States*, 318 U. S. 332 (1943).

Mapp v. *Ohio*, 367 U. S. 643 (1961), requires illegally seized evidence to be excluded from state trials. Every practitioner in the criminal courts knows that the law of search and seizure is of the utmost variety and subtlety. It is complicated by the use of evidence obtained by scientific methods of crime detection, such as wiretapping, electronic eavesdropping, and lie detectors. The scope of the *Mapp* rule is uncertain. Can it reasonably be expected that the unassisted layman will be able to protect his right under the Fourteenth Amendment to have unlawfully seized evidence excluded? We submit that the answer is obviously no.

In view of the above facts, it is not surprising that this Court has recently recognized that "even in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value" (*Reynolds* v. *Cochran*, 365 U. S. 525, 532-33 (1961)) because "the labyrinth of the law is, or may be, too intricate for the layman to master" (*Chewning* v. *Cunningham*, *supra*, 368 U. S. at 446). Thus, in nine of the right to counsel cases decided by this Court since 1942—six of them in the last three years—state criminal convictions have been reversed either wholly or partially because of a finding that the trial was so complex as to require the assistance of counsel.[2] These cases were not exceptional; nor did they present especially abstruse or technical legal questions. Typical of these cases was *Williams* v. *Kaiser*, 323 U. S. 471 (1945), which involved the trial of a defendant for robbery with a deadly weapon. In reversing the conviction, the Court stated (323 U. S. at 474-76):

> "The law of Missouri has important distinctions between robbery in the first degree, robbery in the second degree, grand larceny, and petit larceny.

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[2] *Williams* v. *Kaiser*, 323 U. S. 471 (1945); *Rice* v. *Olson*, 324 U. S. 786 (1945); *Gibbs* v. *Burke*, 337 U. S. 773 (1949); *Cash* v. *Culver*, 358 U. S. 633 (1959); *Hudson* v. *North Carolina*, 363 U. S. 697 (1960); *McNeal* v. *Culver*, 365 U. S. 109 (1961); *Reynolds* v. *Cochran*, 365 U. S. 525 (1961); *Chewning* v. *Cunningham*, 368 U. S. 443 (1961); *Carnley* v. *Cochran*, 369 U. S. 506 (1962).

> These involve technical requirements of the indictment or information, the kind of evidence required for conviction, the instruction necessary to define the several elements of the crime, and the various defenses which are available. These are a closed book to the average layman. * * * A layman is usually no match for the skilled prosecutor whom he confronts in the courtroom. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."

The foregoing should make it plain that the modern trial is of such complexity that any defendant is at a hopeless disadvantage in coping with the problem of defending himself without the aid of a lawyer. It is unfair and a violation of the Due Process Clause to permit a state to require him to do so.

D. The Ineffectiveness of Post-Conviction Remedies Demonstrates the Need for the Appointment of Counsel Initially at Trial.

As seen above, "special circumstances" requiring the appointment of counsel may arise only after the trial has begun. Hence, the rights of defendants under the "special circumstances" rule can be protected only if, once such circumstances become apparent, a new trial is immediately ordered at which the defendant is represented by counsel. But no case has been found in which a court, seeing the possibility of unfairness during trial, has halted the proceeding so that counsel could be appointed. Instead, courts permit the unfair trial to run its course and leave to an appellate tribunal or to a court exercising habeas corpus jurisdiction the question whether constitutional or other error occurred at the trial.

But these post-conviction remedies are unsatisfactory. They do not provide due process—at most they give the defendant a second chance for a fair trial if he can prove the first unfair. They do not grant him the right to a fair

trial initially. More often, they do not even permit the possibility of a second trial. This is so because of the overriding handicaps which a defendant must surmount if he attempts to rectify error committed at trial.

If conviction follows after a trial with no defense counsel, it is rare that counsel can be obtained to prosecute an appeal.[3] And since an effective appeal is unlikely without a lawyer, errors occurring at trial are never brought to the attention of an appellate court in many cases. The vast number of habeas corpus petitions filed in state and federal courts which raise new and substantial legal contentions demonstrate the frequency with which this unfortunate pattern occurs.

If the defendant desires relief after the time for appeal has run, he must educate himself sufficiently in the law (or somehow acquire a lawyer) so as to be able to press his claims through one of the state post-conviction remedies. But state courts rarely grant relief on the ground that a trial was unfair because of lack of counsel. As pointed out in Appendix II, *infra*, pp. 48-49, of 139 state decisions on the issue whether "special circumstances" existed, in only 11 did the court rule that the trial judge had committed error in failing to appoint counsel.

The next step is to petition this Court for certiorari, which is usually denied, often because there was no hearing granted in the state courts that would have revealed the possible validity of a constitutional claim. If the defendant is denied relief in the state courts, he will next try to vindicate his rights by applying for habeas corpus in a federal district court. There, again ordinarily without counsel, he will often be denied a hearing on his allegations or, if a hearing is granted, he may be denied relief on the merits. The defendant then will seek review in a federal

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[3] Of the 139 state decisions only 34 were presented to a state court on direct appeal from the conviction. See Appendix II, *infra*, pp. 48-49.

appellate court, carrying the heavy burden of first obtaining a certificate of probable cause and then persuading this tribunal that his claims are meritorious and that a new trial should be ordered.

The interplay of procedural rules with the denial of counsel under *Betts* v. *Brady* is especially unfair. In most states the defendant must file timely exceptions to rulings made at the trial, and failure to do so results in loss of appellate review or state post-conviction remedies. See *Irvin* v. *Dowd*, 359 U. S. 394 (1959). A procedural slip by the unassisted defendant in the state courts may also preclude the federal courts from considering the merits of a constitutional claim. See generally Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315 (1961). Moreover, no federal habeas corpus review is available to a defendant who does not exhaust state remedies, including appellate review in the state courts and the filing of a petition for certiorari with this Court. See *Darr* v. *Burford*, 339 U. S. 200 (1950).

No exception is made to any of these procedural rules with respect to a defendant who is denied counsel under *Betts* v. *Brady*. The result is that the unrepresented defendant, who cannot be expected to know about these rules, is very likely to lose the only chance of obtaining review of his conviction. Indeed, if the defendant is improperly denied counsel, he may find the doors to both state and federal courts entirely closed to him because of a procedural flaw which is the direct result of the absence of a lawyer—the precise deprivation for which he seeks review.

It is of course possible that at one stage or another an unassisted defendant will be able to overcome the procedural pitfalls and the vast obstacles of proof and satisfy some court that he was convicted without a fair trial. But if this ever occurs, it is generally years after his conviction that the defendant obtains a new trial or, in rare cases, his freedom—debasing years which he has spent in confine-

ment resulting from an unjust trial.[4] Thus, in *Moore* v. *Michigan*, 355 U. S. 155 (1957), 19 years elapsed between the petitioner's unconstitutional trial and vindication of his claim in this Court; in *DeMeerleer* v. *Michigan*, *supra*, 15 years elapsed; in *Uveges* v. *Pennsylvania*, *supra*, 10 years elapsed; and in *Massey* v. *Moore*, 348 U. S. 105 (1954), 14 years elapsed before the original trial was invalidated because of the lack of counsel (see 133 F. Supp. 31 S. D. Tex. 1955)).[5]

The practical result of the "special circumstances" rule is to place an intolerable burden on a criminal defendant who comes into court without the assistance of counsel. He has great difficulty in obtaining assigned counsel, even if he is legally entitled to one under the confusing criteria that purport to guide state courts. He cannot adequately prepare his own case since he is almost always without funds for bail. He must guide himself through the innumerable traps of a confusing trial. If convicted, he must immediately appeal on his own and, in the usual case, try

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[4] That the ultimate result of a new trial may prove that the defendant was guilty is, of course, of no consequence. As Judge (now Mr. Justice) Stewart has observed, in approving the dissenting opinion in an earlier case: "'When a defendant has been denied due process, his guilt or innocence is irrelevant. He has not been tried by civilized standards, and cannot be punished until he has been.'" (*Henderson* v. *Bannan*, 256 F. 2d 363, 388 (6th Cir. 1958) dissenting opinion).)

[5] See also *Garton* v. *Tinsley*, 171 F. Supp. 387 (D. Colo. 1959) (14 years); *United States ex rel. Stone* v. *Randolph*, 165 F. Supp. 284 (E. D. Ill. 1958) (15 years); *Pennsylvania ex rel. Woods* v. *Cavell*, 157 F. Supp. 272 (W. D. Pa. 1957), *aff'd* 254 F. 2d 816 (3d Cir. 1958) (10 years); *Muldread* v. *Bannan*, 137 F. Supp. 533 (E. D. Mich. 1956) (2 years); *Petition of Bland*, 139 F. Supp. 900 (S. D. Tex. 1955) (6 years); *Johns* v. *Overlade*, 122 F. Supp. 921 (N. D. Ind. 1953) (7 years); *Todd* v. *Dowd*, 100 F. Supp. 485 (N. D. Ind. 1949) (2 years); *United States ex rel. Mills* v. *Ragen*, 77 F. Supp. 15 (2 years); *United States ex rel. Mills* v. *Ragen*, 77 F. Supp. 15 (N. D. Ill. 1948) (3 years). See also *Hawk* v. *Hann*, 103 F. Supp. 138 (D. Neb. 1952) (16 years).

to make his way through the maze of state post-conviction remedies. If unsuccessful in the state courts, he must seek review in this Court and, most likely, start anew in a federal district court. If he is somehow fortunate enough to have his claims heard, and his release or a new trial is ordered, it is usually after the lapse of long years during which he has been confined to prison. Surely the Fourteenth Amendment does not permit such a tortuous path to a fair trial.

II

Denial of counsel to criminal defendants contravenes the other standards embodied in the Fourteenth Amendment.

A. Denial of Counsel Abridges the Right to a Hearing.

In *Powell* v. *Alabama, supra*, 287 U. S. at 68, the Court said that "notice and hearing * * * constitute basic elements of the constitutional requirement of due process of law." This principal has often been reaffirmed by this Court. A criminal trial without a defense lawyer, however, is not a "hearing." It is a mockery and a sham, designed to obtain the speediest possible conviction for the State, whose full power is arrayed against the defendant. As the Court stated in *Powell*, "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel" (*id.* at 68-69).

Any attempt to probe the issue of guilt or innocence is not meaningful in the absence of a defense lawyer, and the chances of acquittal for the lawyerless defendant are negligible. As Mr. Justice Stewart pointed out in *Cash* v. *Culver*, 358 U. S. 633, 638 n. 7 (1959):

> "The very fact that the jury failed to convict at the first trial, when the petitioner was represented by counsel, is at least some practical indication of the difference a lawyer's help at the second trial might have made."

If a defendant has a due process right to be cross-examined (see *Ferguson v. Georgia*, 365 U. S. 570 (1961)) he surely has a right to the presence of a lawyer who can do the cross-examining.

Our system of justice depends upon the active participation of trained counsel on both sides—of persons who meet the rigid qualifications necessary for admission to the bar. This is the essence of our adversary system. Lawyers are not superfluous appendages in the criminal process.

That a trial without a defense lawyer does not constitute a "hearing" in the due process sense is further evidenced by the fact that a court itself cannot act in the role of counsel for the accused. "[A] judge, whose functions are purely judicial," the Court stated in *Powell v. Alabama*, cannot "effectively discharge the obligations for the accused"; although the judge may see to it that the accused "be dealt with justly and fairly," he cannot "investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional" (287 U. S. at 61).

The contrast between a prisoner protected at trial by the judge alone and a prisoner represented by counsel was graphically described in 1826 by Justice Joseph Story in a letter to an English member of parliament:

> "It is in vain to tell me that a Judge is, or can be in any just sense, counsel for the prisoner. There are many distinctions, many principles of construction, many illustrations of evidence, many debatable points which, supposing him alive to every cause, always learned, always seeking for light, will elude the grasp of his mind. And after all, how much is gained with a Jury by an advocate, who has sifted all the facts with a cautious and persevering vigilance, and who brings the feelings of his client in aid of a professional duty. I have been a Judge

> fourteen years, and my experience has never led me to doubt the advantage of counsel to prisoners. I have often been instructed by them, and have seen the cause in other and better lights by their labors. Above all, I have seen the public follow convictions, after such appeals from counsel, with a ready and prompt satisfaction of mind. Surely no wise Government can wish to procure convictions where reasonable doubts may weigh with a jury." I William Story, *Life and Letters of Joseph Story* 490 (1851).

B. The Distinction Between Capital and Noncapital Cases With Respect to a Defendant's Right to Counsel Has No Proper Constitutional Basis.

The distinction drawn in *Betts* v. *Brady* between the appointment of counsel in capital cases and that in noncapital cases has no warrant in the language of the Constitution. As Mr. Justice Black said in his concurring opinion in *Carnley* v. *Cochran, supra,* 369 U. S. at 519-20: "[The] Fourteenth Amendment protects life, liberty, and property" and "defendants prosecuted for crime are entitled to counsel whether it is their life, their liberty, or their property which is at stake in a criminal prosecution."

Apart from the language of the Fourteenth Amendment, there is no logical reason to draw a constitutional line between capital and noncapital cases with respect to the right of defendants to be represented by counsel. This is not to overlook the finality of a sentence to death. It is merely to recognize what is well known—that a life sentence for a fixed number of years can have the same ultimate effect as a death sentence. The defendant may never emerge from prison a free man and, even if he does, he may be a broken relic of the person who entered years before. This explains the persistent speculation about the relative severity of the death penalty and a long prison sentence, particularly when the latter is meted out to a defendant of advanced years or to one who is ineligible for parole.

This Court in other contexts has refused to countenance a distinction between capital and noncapital criminal cases. In *Reid* v. *Covert*, 354 U. S. 1 (1957), the Court ruled that civilian dependents of members of the Armed Forces overseas could not constitutionally be tried by a court martial in time of peace for capital offenses committed abroad. Three years later, when a noncapital criminal case arose involving a civilian dependent of a member of the Armed Forces serving abroad, the Government vigorously contended that *Reid* v. *Covert* should be limited to capital cases. That contention was rejected. The Court held that there was no warrant in the language of the Fifth or Sixth Amendments, in constitutional history, or in the probable consequences for military discipline to draw the proposed line. *Kinsella* v. *United States ex rel. Singleton*, 361 U. S. 234 (1960).

In *Griffin* v. *Illinois*, 351 U. S. 12 (1956), the Court refused to accept a distinction between capital and noncapital criminal cases. Illinois provided free trial transcripts for purposes of appellate review to all indigent defendants sentenced to death, but required all other convicted defendants to purchase the transcripts themselves. The Court held that the Fourteenth Amendment required the state to provide some manner of effective review to indigent defendants whether or not they had been sentenced to death. And in *Ferguson* v. *Georgia*, 365 U. S. 570, 596 (1961), the Court explicitly stated that its decision "[did] not turn" on the fact that the appellant was tried for a capital offense, thus recognizing again that fundamental constitutional protections are applicable in all criminal cases.

Similarly in the present case, the Court should expunge the unjustified distinction between capital and noncapital crimes that was improperly imported into the law by *Betts* v. *Brady* without any warrant.

C. The Net Effect of *Betts* v. *Brady* is to Discriminate Unfairly Against Criminal Defendants Who Are Poor.

In *Edwards* v. *California*, 314 U. S. 160, 184-85 (1941), Mr. Justice Jackson observed in a concurring opinion:

> "'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color."

The Justice considered it necessary to make this statement because in the early history of the Court the poor were stepchildren of the law, with limited rights and privileges. Although *City of New York* v. *Miln*, 11 Pet. 102, 142 (1837), was subsequently overruled, the infamous reference in that case to "the moral pestilence of paupers" was to project its influence well into the Twentieth Century.[6]

Although poverty is no longer equated with viciousness or with inferior status, the rule of *Betts* v. *Brady* persists as a grim reminder of the inequities of the past and as the law we are required to live by. The individuals in the state courts who are unable to secure counsel are ordinarily poor and without family. They are people who are least able to protect their personal liberty even when life imprisonment may be at stake. As Mr. Justice Douglas stated in his concurring opinion in *McNeal* v. *Culver*, 365 U. S. 109, 118 (1961):

> "The result of our decisions is to refuse a State the power to force a person into a criminal trial without a lawyer if he wants one and can afford to hire one, but to deny the same protection to an accused who is too poor to retain counsel. This draws a line between rich and poor that is repugnant

[6] For a concise and thoughtful analysis of the impediments to even-handed distribution of criminal and civil justice, see the concurring opinion of the late Judge Jerome Frank in *United States* v. *Johnson*, 238 F. 2d 565, 567 (2d Cir. 1956), reversed, 352 U. S. 565 (1957). See also DORSEN, *The Rich, the Poor, and Equal Justice, The Village Voice*, July 19, 1962, p. 4.

> to due process. The need of counsel is the same, whatever the economic status of the accused. If due process requires that a rich man who wants a lawyer be allowed the opportunity to obtain one before he is tried, why should not due process give the same protection to the accused who is indigent? Even penniless vagrants are at times caught in a tangle of laws that only an astute lawyer can resolve, as our own decisions show."

That the size of a man's purse has no constitutional relevance in the administration of the criminal law is made strikingly evident by *Griffin* v. *Illinois*, *supra*. Although Illinois afforded every defendant convicted in a criminal trial a right of review, it allowed full appellate review only when its appellate court was furnished with a report of the trial proceedings. It was sometimes impossible to fulfill this requirement without a stenographic record of the trial, which was furnished free only to indigent defendants sentenced to death. The petitioners, who had been sentenced to prison for armed robbery, contended that they were denied rights under the Fourteenth Amendment because the State would not provide them with a transcript of the trial, and they could not therefore take an appeal. This Court agreed, ruling that the State that grants appellate review cannot do so in a way that "discriminates against some convicted defendants on account of their proverty." (351 U. S. at 18). As Mr. Justice Black stated (*id.* at 17):

> "Surely no one would contend that either a State or a Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor. In criminal trials a state can no more discriminate on account of poverty than on account of religion, race or color."

In concurring in the conclusion that a state was powerless to produce "a squalid discrimination" based upon "lack of means" (*id.* at 24), Mr. Justice Frankfurter said (*id.* at 23):

> "Of course a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty of a State to correct or cushion. But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed."

Smith v. *Bennett*, 365 U. S. 708 (1961), is a further and more recent example of the determination of this Court not to permit an individual's means to prescribe the quality of justice he receives. Iowa law required the payment of statutory filing fees by state prisoners before an application for a writ of habeas corpus could be made or an appeal docketed in such cases. This test was struck down as violative of the Fourteenth Amendment, the Court saying that "to interpose any financial consideration between an indigent prisoner of the state and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." (365 U. S. at 709).[7]

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[7] See also *Eskridge* v. *Washington State Board*, 357 U. S. 214 (1958); *Ross* v. *Schneckloth*, 357 U .S. 575 (1958); *Burns* v. *Ohio*, 360 U. S. 252 (1959); *Douglas* v. *Green*, 363 U. S. 192 (1960); and *McCrary* v. *Indiana*, 364 U. S. 277 (1960), in which comparable state rules and practices that effectively limited the poor person's access to courts ostensibly open to all, were also found to be constitutionally invalid.

The above decisions, as well as the obvious inequities of any distinction based on means, require the demise of the rule of *Betts* v. *Brady*. If "the Fourteenth Amendment weighs the interest of rich and poor criminals in equal scale" (*Smith* v. *Bennett*, *supra*, 365 U. S. at 714), surely it does so whether it is appellate review that is sought or whether it is a fair trial that is sought in the first instance. That the standard of fundamental fairness, embodied in the Due Process and Equal Protection Clauses, has no room for the invidious distinction spawned by *Betts* v. *Brady* is eloquently asserted in the special report of the Association of the Bar of the City of New York, *Equal Justice for the Accused*, *supra*, at 34:

> "[If] justice is to be equal and accessible for all, an opportunity must be provided by society for all accused, irrespective of their means, to have the help of an attorney. To do less than this is, in the opinion of the committee, inconsistent with the high ideals of our democratic society, which cannot tolerate one form of legal procedure for the rich and another for the poor."

III

The overruling of *Betts* v. *Brady* will significantly improve the administration of justice in the federal and state courts.

Overruling *Betts* v. *Brady* would reduce the incidence of appeal and collateral attack of state criminal convictions, both by eliminating the vast number of right-to-counsel cases and by minimizing trial errors which result from the lack of counsel and which justify appeal or collateral attack. The "special circumstances" rule of *Betts* v. *Brady* has congested both state and federal court dockets with complicated and time-consuming cases which require full review of state trial records. As a careful student of the subject has concluded, "the largest stumbling block in the administration of state criminal law is revealed as the non-

absolute right-to-counsel for indigents in noncapital cases." Reitz, *Federal Habeas Corpus; Post Conviction Remedy for State Prisoners*, 108 U. Pa. L. Rev. 461, 483 (1960). Overruling *Betts* v. *Brady* would also lessen the abrasive effect that the exercise of the habeas corpus power by the federal courts has had upon state systems of criminal justice.[8]

Available statistics indicate that there is a substantial number of prisoners who appeal or seek collateral review of their state criminal convictions on grounds that they have been denied counsel at trial. See Reitz, *supra*, 108 U. Pa. L. Rev. at 483. Moreover, each prisoner with a right-to-counsel claim may present it to the state and federal courts repeatedly—on direct appeal, on state collateral review, and, since *Moore* v. *Dempsey*, 261 U. S. 86 (1923), in a federal habeas corpus proceeding. Each time a review by certiorari may be sought in this Court. More difficult to estimate is the number of cases in which events occur at the trial, because of the absence of a defense lawyer, which later affords a basis of appeal or collateral attack.[9] Such cases probably add substantially to the dockets of the state and federal courts, including this Court.

The resources and judicial energy expended in disposing of these two types of cases is enormous and is increasing each year. For example, the number of habeas corpus petitions filed in the United States District Courts has grown

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[8] Although a rule that counsel is never required at trial would also eliminate right-to-counsel cases, no one would today argue that such a rule is consonant with the Due Process Clause.

[9] The State of Oregon in its *amicus* brief (p. 4) points out that in 15 of 20 cases in which relief was afforded under its recently enacted Post Conviction Relief Act, no attorney had represented the accused at the time the error was committed at the trial. See also Section C of its brief.

rapidly—from 127 in 1941[10] to 482 in 1951[10] and 871 in 1960.[11] There has also been a marked up-swing in such cases brought for review to the United States Court of Appeals and to this Court. During a 21/2 year period this Court disposed of 1234 cases involving state prisoners seeking review of state convictions, of which 1014 originated as collateral attacks on the state judgment.[12]

Overruling *Betts* v. *Brady* would sharply decrease the volume of cases in the courts of those states which persist in denying counsel at trial and are therefore bound by the confounding complexities of the "special circumstances" rule. Overruling *Betts* v. *Brady* would also remove from the lower federal courts a vast number of habeas corpus petitions and would radically reduce the number of petitions for certiorari to this Court.

Quite apart from relieving the federal courts of the sheer number of state criminal cases, overruling *Betts* v. *Brady* would also reduce the federal-state conflict inherent in the federal habeas corpus remedy. *Betts* has been a major—if not *the* major—cause of the proliferation of vexing habeas corpus cases. A substantial percentage of federal habeas corpus petitions have involved a right-to-counsel claim. In roughly one half of the thirty-five cases, over a period of approximately 10 years, in which a federal court ordered a state prisoner released in a habeas corpus proceeding, one of the grounds was that the accused had not been represented by counsel. In addition, many of the other errors in these cases—whether disqualification of a juror,

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[10] H. R. Rep. No. 1293, 85th Cong., 2nd Sess. 26 (1958).

[11] [1960] Administrative Office of the U. S. Courts Ann. Rep., printed in [1960] U. S. Judicial Conference Ann. Rep. 235.

[12] See Rodak and Spaniol, *Preliminary Report of a Study of the Dockets of the Supreme Court of the U. S. in Relation to Federal Habeas Corpus Jurisdiction* (March 1959, unpublished).

perjury or some other ground—could have been cured at the trial if a defense lawyer had been present, thus obviating resort to the writ of habeas corpus. See *Reitz, supra*, 108 U. Pa. L. Rev. at 481-87.

Accordingly, if *Betts* v. *Brady* had not been the law during the past decade, the number of federal habeas corpus cases involving maximum federal-state friction may well have been cut by more than half.

This vast increase in federal habeas corpus petitions, greatly accelerated by *Betts* v. *Brady*, has exacerbated federal-state relations and has led to the introduction in Congress of bills to limit the means and manner in which the federal courts may entertain the petitions from state prisoners. Prominent voices have been raised in support of these bills.[13] Such criticism is bound to depreciate the moral stature of the writ and to impair the complicated relationships within the federal judicial system. Abolishing the rule of *Betts* v. *Brady* would help to remove some of the opposition to federal habeas corpus jurisdiction.

In addition, overruling *Betts* v. *Brady* would enable the lower federal courts and this Court to focus attention on the broader legal problems involved in the exercise of federal habeas corpus jurisdiction rather than on the meticulous review of state court trial records, as required by the "special circumstances" rule.

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[13] For example, at almost all of its recent meetings the Conference of State Chief Justices adopted resolutions to restrain the "improper use of writs of habeas corpus by prisoners who have been convicted in state courts and who seek to have the action of state courts reviewed and reversed by lower federal courts." The late Chief Judge Parker, testifying on behalf of the Judicial Conference of the United States, recognized the "resentment on the part of The State judiciary against the action of the Federal judiciary." Hearings on H. R. 5649 Before Subcommittee No. 3 of the House Committee on the Judiciary, 84th Cong., 1st Sess., Ser. 6, at 7 (1955).

IV

The appointment of counsel for indigent defendants in criminal cases in a state court would not place an undue burden on local communities or on the bar.

In the court-martial cases decided in 1960, the Government contended that the lack of practical alternatives to military jurisdiction over civilians was an important factor which the Court had to consider in deciding the petitioners' constitutional claims. See *Kinsella* v. *United States ex rel Singleton*, *supra*, 361 U. S. at 243-44; *McElroy* v. *United States ex rel Guagliardo*, 361 U. S. 281, 287 (1960). Although the Court recognized that the cost to the Government to pursue alternatives to court-martial jurisdiction must be large, it stated that this cost "is the price the government must pay in order to comply with constitutional requirements." (361 U. S. at 287).

The situation presently before this Court is comparable; whatever cost is to be placed upon the state courts, local communities, and the bar must be borne as a result of the clear constitutional requirement that all indigent defendants in state criminal cases have a right to be furnished with counsel. In point of fact, however, a system of legal representation for indigent defendants can result in a social and even a financial cost saving.

In the first place, the lack of effective representation of indigent defendants in criminal cases creates a social cost of largely indeterminable but nevertheless real and serious proportions. No state can long afford to provide one standard of justice for the rich and another for the poor. Such a situation can only create a sense that the benefits of our judicial system can be enjoyed only by those who can pay for them. As the Attorney General recently stated, "If

justice is priced in the market place, individual liberty will be curtailed and respect for law diminished."[14]

Over and above the questions of social cost, a system of legal representation for indigent defendants may save a community more than it costs. Such a system reduces the burdens on the judiciary and prosecution from the flood of collateral post-conviction proceedings based on real or fancied trial injustices resulting from lack of trial counsel (see *supra*, pp. 30-32). And by helping to eliminate delays in the administration of justice, the prompt assignment of counsel sharply reduces detention and other costs presently borne by the state.

Furthermore, there is every indication that the 35 or more states which currently appoint counsel for indigent defendants as a matter of course easily meet the cost of providing adequate representation. Thus, Oregon has concluded that "it would provide greater protection of constitutional rights, and would be less expensive, to insist upon counsel in each original criminal proceeding than to attempt by a post-conviction proceeding to recover justice, lost by defects at the trial." Brief for State of Oregon as Amicus Curiae, p. 6.

The states that now require appointment of counsel are located in every geographic area of the country. The four basic systems that have been developed, and their success in the states employing them, suggest strongly that the practical implementation of at least one of these plans is well within the power of the 15 or fewer states that do not currently provide legal assistance to indigents. See, generally, *Equal Justice for the Accused*, *supra* at 47-52. The four systems are as follows:

1. *The Assigned Counsel.* Under this system, when a defendant appears at arraignment without counsel, the

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[14] R. F. Kennedy, Address before the House of Delegates American Bar Association, August 6, 1962.

judge assigns a lawyer to represent him. In capital cases, the assigned counsel is generally experienced and reasonable compensation is provided. The cost has not been high because of the relative infrequency of such cases. In non-capital cases most states do not provide a fee for assigned counsel. Thus, the cost to the community is kept to a minimum and the burden is placed upon the local bar.

An assigned counsel system, in which an adequate fee is paid for each assignment, is more expensive than a voluntary or a public defender system. For example, in Marin County, California, the cost of fees paid to assigned counsel was high enough to be a determining factor in the establishment of a public defender system. See *Equal Justice for the Accused*, *supra*, at 81. Whether or not the assigned counsel system provides for compensation, the burden upon the bar need not be heavy. The New Jersey assignment system, drawing upon the entire state bar, makes the assigned counsel plan systematic so that the burden is spread evenly and is well within the means of the bar. See Trebach, *A Modern Defender System for New Jersey*, 12 Rutgers L. Rev. 289 (1957).

2. *The Voluntary Defender.* Voluntary defender offices are generally privately controlled and supported by charity. A voluntary defender system may use salaried investigators or it may be aided by volunteers from private law offices or local law schools. Such a system is typical of the large urban centers in the East. Its cost to the community and the bar is minimal.

During the decade 1951-60, the National Legal Aid and Defender Association built up a professional membership of over 1200 lawyers working through over 130 local legal aid organizations. Legal Aid is a voluntary association totally reliant on gifts and contributions. Support that has come from charitable organizations, such as the Ford Foundation, and large industrial corporations, has greatly

lessened the burden on the public of providing adequate legal aid. See Brownell, *A Decade of Progress: Legal Aid and Defender Services*, 47 A.B.A.J. 867 (1961).

3. *The Public Defender.* Since a public defender is a public official, public funds are necessary to finance this means of providing counsel to indigent defendants. In some communities, particularly in the West, it has been found that a public defender system is more economical than an assigned counsel system and only 15 to 25% as expensive as the office of the public prosecutor. See *Equal Justice for the Accused*, *supra* at 81, 137. This is an expense which the large urban communities could easily bear.

A committee of the Judicial Conference of the United States, Judges Augustus N. Hand, Otto Kerner, Guy V. Bard and Eugene Rice, felt that the public defender system could advantageously be put to use even in sparsely settled districts. See Hearings Before the Subcommittee on the Study of Representation of Indigent Defendants in Federal Criminal Cases of the House Committee on the Judiciary, 83d Cong., 2d Sess. 32-37 (1954). As stated by former Attorney General Brownell (*id.* at 21):

> "[S]o long as there is to be government of and by law, we hold no doubt that the burden of prosecution is a community responsibility to be undertaken and paid for as a common expense. Equally the burden of providing a fair trial is upon the community. The right to representation is a concomitant of fair trial, and though it is personal to the defendant and may vary with his choice and means, it cannot be permitted to fail just because the accussed is a poor person. At that point the community must supply the deficiency."

4. *The Mixed Private-Public System.* This plan involves the use of charitable funds as in the Voluntary Defender System, and the use of public funds, as in the Public Defender System. Since part of the cost is borne by voluntary contributions, the direct cost to the public is smaller

than that of the Public Defender System. A defender is employed by the Legal Aid organization of the community and thus relieves the bar of its obligation. Although private participation may be limited to furnishing full time counsel as in Rochester and Buffalo, New York, a system may be provided, as in Puerto Rico, which receives direct appropriations from the legislature, funds and facilities from the Bar Association, and contributions from the public. See address by former Chief Justice A. Cecil Snyder of the Supreme Court of Puerto Rico before 34th Annual Meeting of The National Legal Aid Association, quoted in 14 (No. 2) The Legal Aid Brief Case 60-61 (1956).

Which system any particular community selects will depend, of course, upon its type and size, the number of indigents accused of crime, conditions within the local bar, the probable cost to the community, and the capacity to meet this cost. Many specialized organizations, such as the National Legal Aid Society and the Voluntary Defender Association, can furnish detailed information to any community faced with the need to establish a system to provide counsel for indigent defendants.[15]

In those states which as yet do not employ any of the available systems of assigning counsel to poor people accused of crime, the members of the local bar no doubt are as willing to assume their professional responsibilities as their colleagues in states that require the assignment of counsel. As already noted, the cost to the community of establishing a method of assigning counsel is minimal; the cost to the community in refusing to provide for representation of indigent defendants is incalculable.

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[15] Maryland has recently enacted a new Post Procedure Conviction Act (Code, 1958 Supp. Art. 27, § 645A-J), which requires appointment of counsel for all indigent prisoners utilizing the procedural remedies outlined in the Act. See *Byrd* v. *Warden, Md. Penitentiary*, 219 Md. 681, 147 A. 2d 701 (1959). Presumably, the procedure for appointment of counsel for indigent *prisoners* could be applied without difficulty to indigent *defendants*.

V

The constitutional development of the exclusionary rule in search and seizure cases, culminating in *Mapp* v. *Ohio*, is a compelling historical model for requiring the appointment of counsel in all criminal cases.

Only two terms ago, this Court in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), re-examined the relationship between the Fourteenth Amendment and the Fourth Amendment. It held that the Fourteenth Amendment incorporated not only the abstract right to be free from unreasonable searches and seizures, but also the rule, applicable under the Fourth Amendment, which requires the exclusion of evidence so seized. Similarly, the Court should hold in this case that the Fourteenth Amendment incorporates from the Sixth Amendment not only the abstract right to counsel, but also the rule applicable in federal courts under the Sixth Amendment that a lawyer must be appointed to assist a defendant unable to provide his own.

The question of obligatory exclusion of evidence at state trials was first raised in *Wolf* v. *Colorado*, 338 U. S. 25 (1948). In that case the Court held (*id.* at 27-28):

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."

Despite this ruling, the Court in *Wolf* refused to require illegally seized evidence to be excluded at trial. It reached this result even though in *Weeks* v. *United States*, 232 U. S. 383 (1914), it had held that, in a federal prosecution, the exclusionary rule would be judicially implied as part of the fundamental core of the Fourth Amendment. The conclusion that the Constitution required the same result as to state trials was ultimately drawn in the *Mapp* case, in

which the Court, in overruling *Wolf*, held that "[s]ince the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government" (367 U. S. at 655).

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense." In *Powell* v. *Alabama*, *supra*, the Court concluded that the right of assistance of counsel was of a fundamental character, applicable to the states through the Due Process Clause of the Fourteenth Amendment (287 U. S. at 68). But how was this fundamental right of assistance of counsel to be enforced?

That question was soon to be decided, in essence, by the Court in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), which reanalyzed the basic principles enunciated in the *Powell* case and concluded that "[t]he Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel" (*id.* at 463). Thus, just as the Court in *Weeks* had required the application of the exclusionary rule in federal cases, so the Court in *Johnson* judicially implied as part of the fundamental core of the Sixth Amendment the appointment of counsel for all indigent defendants in federal cases. Significantly, in both instances the conclusion was not based merely upon the express language of the Constitutional provisions. As the Court observed in *Bute* v. *Illinois*, *supra*, 333 U. S. at 660-661:

> "[U]ntil the decision * * * in *Johnson* v. *Zerbst* * * *, there was little in the decisions of any courts to indicate that the practice in the federal courts, except in capital cases, required the appointment of counsel to assist the accused in his defense, as contrasted

with the recognized right of the accused to be represented by counsel of his own if he so desired."

Despite the fact that the right to appointed counsel had been read into the core of the Sixth Amendment, the Court in *Betts* v. *Brady, supra*, failed to apply the same reasoning to the Fourteenth Amendment, just as the Court in *Wolf* had failed to apply the reasoning in *Weeks* to an unconstitutional search and seizure under the Fourteenth Amendment.

Mapp v. *Ohio* held that the failure to apply the exclusionary rule to state cases had been error. So also, it is submitted, the "special circumstances" rule is fundamentally wrong. Since the right of an indigent to have counsel appointed is an essential part of the right to assistance of counsel under the Sixth Amendment, as recognized by this Court in *Johnson* v. *Zerbst, supra*, it should also be insisted upon as an essential ingredient of the right to assistance of counsel under the Fourteenth Amendment. To hold otherwise is to grant the form of assistance of counsel, but in reality to withhold its enjoyment in substance by all indigent defendants.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Florida should be reversed and the cause remanded to the Circuit Court of Bay County with instructions to grant petitioner a new trial at which counsel is appointed on his behalf.

Respectfully submitted,

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November, 1962.

APPENDIX I

State Requirements Regarding Appointment of Counsel

In 1961, Mr. Justice Douglas appended to his concurring opinion in *McNeal* v. *Culver*, 365 U. S. 109, 119 (1961), a compilation of the laws of the states regarding the right to appointment of counsel. This Appendix brings that classification to date. We find that the constitution, statutes or rules of court in thirty-five states provide for the appointment of counsel on behalf of an indigent in any felony case as a matter of course; fifteen states either make no explicit provisions in their constitution, statutes or rules of court for appointment of counsel in all felony cases or make provision only in capital cases and leave the appointment of counsel to the discretion of the trial judge in other felony cases. However, in at least six of the latter fifteen states, namely, Delaware, Hawaii, Maine, New Hampshire, Rhode Island and Vermont, there appears to be a practice to appoint counsel for indigent defendants in all felony cases. See Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right of an Accused,"* Appendix I, to be printed in 30 U. Chi. L. Rev. No. 1 (1962). This is borne out by the relative infrequency of cases dealing with the problem in these six states. See table, Appendix II, pp. 48-49 *infra*.

A. Appointment of Counsel for Indigents in All Felony Cases, as of Course, by Force of the State Constitution, Statutes, Court Rule, or Judicial Decision.

Alaska:	Rules of Criminal Procedure, Rule 39(b).
Arizona:	Rules of Criminal Procedure, Rule 163.
Arkansas:	Ark. Stat. § 43-1203.
California:	Calif. Penal Code § 987.
Connecticut:	Gen. Stat. of Conn. (1958 Rev.) § 54-80. See *State* v. *Reid*, 149 A. 2d 698 (1959).

Georgia:	Ga. Const., Art. 1, § 1, Par. V (Ga. Code Ann. § 2-105). See *Bibb County* v. *Hancock*, 86 S. E. 2d 511 (1955).
Idaho:	Idaho Code Ann. §§ 19-1512, 19-1513.
Illinois:	Ill. Supreme Court Rules, Rule 26(2), Ill. Rev. Stat. (1959), c. 110, §101.26(2).
Indiana:	Ind. Const., Art. I, § 13. See *State ex rel. Grecco* v. *Allen Circuit Court*, 153 N. E. 2d 914 (1958).
Iowa:	Iowa Code Ann. § 775.4.
Kansas:	Gen. Stat. of Kansas (1961 Supp.) § 62-1304.
Kentucky:	Ky. Const., § 11; Ky. Rev. Stats. 1960 § 455.010. See *Calhoun* v. *Commonwealth*, 193 S. W. 2d 420 (1946).
Louisiana:	La. Rev. Stat. § 15-143.
Massachusetts:	Rule 10, General Rules of the Supreme Judicial Court of Massachusetts, 337 Mass. 813; Ann. Laws of Mass., c. 221, § 34D; c. 277, § 47.
Minnesota:	Minn. Stat., 1959, § 611.07.
Missouri:	Mo. Rev. Stat., 1959, § 545.820; Rule 29.01, Supreme Court Rules, Mo. Rev. Stat., 1959.
Montana:	Rev. Code of Montana § 94-6512.
Nebraska:	Rev. Stat. of Nebraska (1959 Cum. Supp.) § 29-1803.
Nevada:	Nev. Rev. Stat. § 174.120.
New Jersey:	N. J. Const., Art. I, Para. 10; Rev. Rules, § 1:12-9.

New Mexico:	N. M. Stat. Ann. (1953 Comp.) § 41-11-2. Cf. Const., Art. II, § 14; see *State* v. *Garcia*, 142 P. 2d 552 (1943).
New York:	N. Y. Code of Criminal Procedure § 308.
North Dakota:	N. D. Century Code § 29-01-27, 29-13-03.
Ohio:	Ohio Rev. Code § 2941.50.
Oklahoma:	22 Okla. Stat. § 464.
Oregon:	Ore. Rev. Stat. § 135.320.
South Dakota:	S. D. Code § 34.3506; S. D. Code (1960 Supp.) § 34.1901.
Tennessee:	Tenn. Code §§ 40-2002, 40-2003.
Texas:	Vernon's Texas Code of Criminal Procedure § 494, as amended by Acts 1959, 56th Leg., p. 1061, c. 484, § 1.
Utah:	Utah Code Ann. § 77-22-12.
Virginia:	Code of Va. § 19.1-241.
Washington:	Rev. Code of Wash. § 10.01.110.
West Virginia:	Rules of Practice for Trial Courts, Rule IV.
Wisconsin:	*Carpenter & Sprague* v. *Dane County*, 9 Wis. 274 (1859). See Wis. Stat. Ann. § 957.26.
Wyoming:	Wyo. Stat. § 7-7.

B. States Not Making Provision for Appointment of Counsel for Indigents in All Felony Cases.

Alabama:	Code of Ala., Tit. 15, § 318 (capital cases). See *Gilchrist* v. *State*, 173 So. 651 (1937).
Colorado:	Colo. Rev. Stat. § 39-7-29. See *Kelley* v. *People*, 206 P. 2d 337, cert. denied, 338 U. S. 880 (1949).

Delaware:	Superior Court Rules—Criminal Rule 44 (capital cases and "any other case in which the court deems it appropriate").
Florida:	Fla. Stat. § 909.21 (capital cases). See *Watson* v. *State*, 194 So. 640 (1940).
Hawaii:	Rev. Laws of Hawaii (1960 Supp.) § 253-5.
Maine:	Me. Rev. Stat., c. 148, § 11 (capital cases and where sentence of life imprisonment may be imposed, otherwise permissive).
Maryland:	Md. Rules of Procedure, Criminal Causes, Rule 723, § b (in all capital cases and other "serious cases").
Michigan:	Mich. Comp. Laws, 1948, § 775.16, as amended by Public Acts 1957, No. 256. See *People* v. *Williams*, 195 N. W. 818 (1923).
Mississippi:	Miss. Code Ann. (rec. 1956) § 2505 ("capital crime").
New Hampshire:	N. H. Rev. Stat. §§ 604:1, 604:2 (capital crimes or other cases where "injustice may be done if provision is not made therefor").
North Carolina:	N. C. Gen. Stat. § 15-4.1. See *State* v. *Davis*, 103 S. E. 2d 289 (1958).
Pennsylvania:	Purdon's Pa. Stat., Tit. 19, §§ 783, 784 (capital cases).
Rhode Island:	Gen. Laws of Rhode Island § 12-15-3.
South Carolina:	S. C. Code of Laws § 17-507 (capital cases). See *State* v. *Hollman*, 102 S. E. 2d 873 (1958).
Vermont:	13 Vt. Stat. Ann. § 6503. See *State* v. *Gomez*, 96 A. 190 (1915).

APPENDIX II

Decisions of State Courts Regarding Right to Appointment of Counsel in Noncapital Cases

Since this Court's decision in *Betts v. Brady*, 139 cases have been found which review a state court's determination whether special circumstances existed requiring the appointment of counsel at trial. These decisions consist of the following: (1) reported state court decisions from those states not requiring appointment of counsel in noncapital cases expressly passing upon the application of the special circumstances rule; (2) decisions in this Court affirming or reversing prior unreported state court decisions raising the question of lack of counsel at trial; and (3) other federal court decisions passing upon habeas corpus petitions which refer to prior unreported state court decisions. Cases from states which now require appointment of counsel are not included.

The cases may be broken down according to the following table:

State	Direct appeals from original conviction	State Post-conviction proceedings	Total State cases	State decisions finding special circumstances	Remands for hearing	State decisions finding no special circumstances
Ala.	6	1	7	0	0	7
Colo.	0	3	3	0	0	3
Fla.	4	13	17	1	1	15
Maine	1	0	1	0	0	1
Md.	4	34	38	3	0	35
Mich.	3	6	9	2	0	7
Miss.	7	1	8	2	0	6
N. H.	0	1	1	0	0	1
N. C.	5	3	8	2	0	6
Penna.	2	42	44	1	3	40
R. I.	0	1	1	0	0	1
S. C.	2	0	2	0	0	2
Del., Hawaii, Vt.	0	0	0	0	0	0
	34	105	139	11	4	124

State	Petition for certiorari filed in U. S. Sup. Ct	Certiorari granted	State decision reversed	State decision affirmed	Special circumstances found on federal habeas corpus	Special circumstances not found on federal habeas corpus
Ala.	3	0	0	0	0	0
Colo.	3	0	0	0	1	0
Fla.	5*	4*	3	0	1	0
Maine	0	0	0	0	0	0
Md.	4	0	0	0	0	0
Mich	6	3	2	1	1	1
Miss.	2	0	0	0	0	0
N. H.	0	0	0	0	0	0
N. C.	2	1	1	0	0	0
Penna.	17	6	5	1	1	1
R. I.	0	0	0	0	0	0
S. C.	0	0	0	0	0	0
Del., Hawaii, Vt.	0	0	0	0	0	0
	42	14	11	2	4	2

* Includes present case.

Cases in Which Special Circumstances Found by State Court

Fla.

*Asbey v. State, 102 So. 2d 407 (1958)

Md.

*Hill v. State, 145 A. 2d 445 (1958)
Raymond v. State, 65 A. 2d 285 (1949)
*Jewett v. State, 58 A. 2d 236 (1948)

Mich.

People v. Whitsitt, 103 N. W. 2d 424 (1960)
People v. Coates, 81 N. W. 2d 411 (1957)

Miss.

Walters v. Ernest, 106 So. 2d 137 (1958)
*Gray v. State, 78 So. 2d 588 (1955)

N. C.

*State v. Simpson, 90 S. E. 2d 708 (1956)
*State v. Wagstaff, 68 S. E. 2d 858 (1952)

Pa.

*Comm. v. Strada, 90 A. 2d 335 (1952)

Cases in Which Hearing on Defendants' Allegations Ordered by State Court

Fla.

Sneed v. Mayo, 66 So. 2d 865 (1953)

Pa.

Commonwealth ex rel. Wagner v. Tees, 101 A. 2d 770 (1953)
Commonwealth ex rel. Dote v. Burke, 96 A. 2d 151 (1953)
Commonwealth ex rel. Hice v. Ashe, 70 A. 2d 479 (1950)

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* Asterisks refer to cases presented to state appellate court on direct appeal from original conviction.

Cases in Which No Special Circumstances Found by State Court

Ala.

*Atrip v. State, 136 So. 2d 574 (1962)
*Pogoliek v. State, 141 So. 2d 296 (1962)
*Allen v. State, 132 So. 2d 327 (1961), cert. denied, 368 U. S. 1001 (1962)
*Wilson v. State, 87 So. 2d 447 (1956)
*Smith v. State, 38 So. 2d 287 (1947)
*Cook v. State, 22 So. 2d 924 (1945), cert. denied, 22 So. 2d 925 (1945)
Mackreth v. Wilson, 15 So. 2d 112 (1943), cert. denied 15 So. 2d 114 (1943), cert. denied, 321 U. S. 772 (1944)

Colo.

Freeman v. Tinsley, 308 P. 2d 220 (1957), cert. denied, 355 U. S. 843 (1957)
Kelley v. People, 206 P. 2d 337 (1949), cert. denied, 338 U. S. 880 (1949)
See Garton v. Tinsley, 171 F. Supp. 387 (D. Colo. 1959) (special circumstances found on federal habeas corpus)

Fla.

Denton v. Cochran, 131 So. 2d 734 (1961)
Dover v. Cochran, 126 So. 2d 139 (1961)
*Horoshko v. State, 135 So. 2d 865 (1961)
Carnley v. Cochran, 123 So. 2d 249 (1960), rev'd 369 U. S. 506 (1962)
Jones v. Cochran, 121 So. 2d 657 (1960), 125 So. 2d 99 (1960)
Butler v. Culver, 111 So. 2d 35 (1959)
Cash v. Culver, original unreported state court decision denying writ of habeas corpus rev'd, 358 U. S. 633 (1959); subsequently hearing ordered, 120 So. 2d 590 (1960), new trial ordered 122 So. 2d 179 (1960)

McNeal v. Culver, 113 So. 2d 381 (1959), reversed and remanded, 365 U. S. 109 (1961), new trial ordered, 132 So. 2d 151 (1961)
McMahon v. Mayo, 92 So. 2d 806 (1957)
*Sheffield v. State, 90 So. 2d 449 (1956)
*McAfee v. State, 46 So. 2d 455 (1950)
Johnson v. Mayo, 40 So. 2d 134 (1949)
Johnson v. Mayo, 28 So. 2d 585 (1946), cert. denied, 329 U. S. 804 (1947)
See Wade v. Mayo, 334 U. S. 672 (1948) (special circumstances found on federal habeas corpus)
See Gideon v. Cochran (R. 47)

Maine

*Pike v. State, 123 A. 2d 774 (1956)

Md.

*Patterson v. State, 175 A. 2d 746 (1961)
Lishure v. Warden, Md. Penitentiary, 156 A. 2d 435 (1959)
*Roberts v. State, 150 A. 2d 448 (1959)
Brown v. Warden, Md. House of Correction, 145 A. 2d 280 (1958)
Woolford v. Warden, Md. House of Correction, 137 A. 2d 646 (1958)
Fairbanks v. Warden, Md. House of Correction, 132 A. 2d 108 (1957)
Marvin v. Warden, Md. Penitentiary, 129 A. 2d 85 (1957)
Thompson v. Warden, Md. House of Correction, 136 A. 2d 909 (1957), cert. denied, 356 U. S. 943 (1958)
Young v. Warden, Md. House of Correction, 129 A. 2d 71 (1957)
Chavez v. Warden, Md. Penitentiary, 125 A. 2d 669 (1956)
Shaffer v. Warden, Md. House of Correction, 126 A. 2d 573 (1956)

Dowling v. Warden of Md. House of Correction, 127 A. 2d 136 (1956)

Chamell v. Warden of Md. House of Correction, 125 A. 2d 672 (1956)

Tibbs v. Warden of Md. House of Correction, 123 A. 2d 353 (1956)

Walker v. Warden of Md. House of Correction, 121 A. 2d 714 (1956)

Wilson v. Warden, Md. House of Correction, 121 A. 2d 695 (1956)

Truelove v. Warden of Md. House of Correction, 115 A. 2d 297 (1955)

France v. Warden of Md. House of Correction, 109 A. 2d 65 (1954), cert. denied, 348 U. S. 955 (1955)

Frazier v. Warden of Md. Penitentiary, 109 A. 2d 78 (1954)

Spence v. Warden of Md. House of Correction, 103 A. 2d 345 (1954)

Daisey v. Superintendent, Md. House of Correction, 98 A. 2d 99 (1953)

State ex rel. De Lisle v. Warden, Md. Penitentiary, 98 A. 2d 15 (1953)

Martucci v. Warden, Md. House of Correction, 96 A. 2d 490 (1953)

Pridgen v. Warden, Md. Penitentary, 92 A. 2d 455 (1952)

Selby v. Warden of Md. House of Correction, 92 A. 2d 756 (1952)

Knott v. Warden, Md. House of Correction, 90 A. 2d 177 (1952), cert. denied 344 U. S. 847 (1952)

Williams v. Warden, Md. House of Correction, 89 A. 2d 228 (1952)

Langrehr v. Warden, 84 A. 2d 61 (1951)

State ex rel. Loane v. Warden of Md. Penitentiary, 75 A. 2d 772 (1950)

State ex rel. Eberle v. Warden of Md. Penitentiary, 65 A. 2d 291 (1949), cert. denied, 338 U. S. 835 (1949)

Landon v. Warden, Md. House of Correction, 61 A. 2d 562 (1948)

Jackson v. Warden of Md. House of Correction, 60 A. 2d 179 (1947)

State ex rel. Williams v. Warden of Md. Penitentiary, 60 A. 2d 186 (1948)

State ex rel. Eyer v. Warden of Md. Penitentiary, 59 A. 2d 745 (1948), cert. denied, 335 U. S. 804 (1948)

Nance v. Warden of Md. House of Correction, 53 A. 2d 554 (1947)

Mich.

People v. Moore, 73 N. W. 2d 274 (1955), rev'd *sub nom* Moore v. Michigan, 355 U. S. 155 (1957)

People v. Henderson, 72 N. W. 2d 177 (1955) cert. denied, 351 U. S. 967 (1956); see also Henderson v. Bannan, 256 F. 2d 363 (6th Cir. 1958) (no special circumstances found on federal habeas corpus)

*People v. Sumeracki, 40 N. W. 2d 790 (1950)

People v. Quicksall, 33 N. W. 2d 904 (1948), aff'd *sub nom* Quicksall v. Michigan, 339 U. S. 660 (1950)

People v. De Meerleer, 21 N. W. 2d 849 (1946), rev'd *sub nom* DeMeerleer v. Michigan, 329 U. S. 663 (1947)

In Re Elliot, 24 N. W. 2d 528 (1946), cert. denied, 330 U. S. 841 (1947)

*People v. Haddad, 11 N. W. 2d 240 (1943)

*People v. Haddad, 11 N. W. 2d 241 (1943)

See Mullreed v. Bannan, 137 F. Supp. 533 (E. D. Mich. 1956) (special circumstances found on federal habeas corpus)

Miss.

*Conn v. State, 105 So. 2d 760 (1958)
*Fogle v. State, 97 So. 2d 645 (1957)
*Poole v. State, 90 So. 2d 212 (1956), cert. denied, 353 U. S. 988 (1957)
*Phenix v. State, 61 So. 2d 392 (1952)
*Odom v. State, 37 So. 2d 300 (1948), appeal dismissed, 336 U. S. 932 (1949)
*Fisher v. State, 11 So. 2d 806 (1943)

N. H.

Fitzgibbons v. Hancock, 82 A. 2d 769 (1951)

N. C.

*State v. Davis, 103 S. E. 2d 289 (1958)
*State v. Hackney, 81 S. E. 2d 778 (1954)
*State v. Cruse, 76 S. E. 2d 320 (1953)
In Re Taylor, 49 S. E. 2d 749 (1948); 53 S. E. 2d 857 (1949)
State v. Hedgebeth, 45 S. E. 2d 563 (1947), cert. granted *sub nom* Hedgebeth v. North Carolina, 333 U. S. 854 (1948), cert. dismissed, 334 U. S. 806 (1948)
See Hudson v. North Carolina, 363 U. S. 697 (1960) (unreported state decision reversed)

Pa.

Commonwealth ex rel. Edwards v. Myers, 169 A. 2d 124 (1961), affirmed 175 A. 2d 70 (1961), cert. denied, 369 U. S. 840 (1962)
Commonwealth ex rel. Pitchcuskie v. Banmiller, 168 A. 2d 636 (1961), cert. denied, 368 U. S. 903 (1961)
Commonwealth ex rel. Gant v. Banmiller, 171 A. 2d 603 (1961)
Commonwealth ex rel. Harris v. Cavell, 171 A. 2d 630 (1961)
Commonwealth v. Miner, 173 A. 2d 686 (1961)
Commonwealth ex rel. Rothrock v. Russell, 169 A. 2d 790 (1961)
Commonwealth ex rel. Simon v. Maroney, 171 A. 2d 889 (1961)

Commonwealth v. Jackson, 165 A. 2d 392 (1960)
Commonwealth ex rel. Diggs v. Banmiller, 155 A. 2d 402 (1959)
Commonwealth ex rel. Gilson v. Keenan, 138 A. 2d 259 (1958), cert. denied, 357 U. S. 910 (1959)
Commonwealth ex rel. Faulde v. Banmiller, 140 A. 2d 455 (1958)
Commonwealth ex rel. Robinson v. Cavell, 138 A. 2d 172 (1958) cert. denied, 357 U. S. 921 (1958)
Commonwealth ex rel. Henderson v. Kruger, 119 A. 2d 870 (1956)
Commonwealth ex rel. Hendrickson v. Myers, 126 A. 2d 485 (1956), affirmed, 144 A. 2d 367 (1958)
Commonwealth ex rel. Czarnecki v. Stitzel, 115 A. 2d 805 (1955)
Commonwealth ex rel. Hallman v. Tees, 118 A. 2d 273 (1955)
Commonwealth ex rel. Miller v. Maroney, 116 A. 2d 755 (1955)
Commonwealth v. Kadio, 115 A. 2d 777 (1955), cert. denied *sub nom* Kadio v. Pennsylvania, 350 U. S. 1001 (1956)
Commonwealth v. Peters, 113 A. 2d 327 (1955)
Commonwealth ex rel. Ringer v. Maroney, 110 A. 2d 801 (1955), cert. denied, 350 U. S. 916 (1955)
Commonwealth v. Snow, 116 A. 2d 283 (1955)
Commonwealth ex rel. Herman v. Claudy, 107 A. 2d 595 (1954), rev'd, 350 U. S. 116 (1956)
Commonwealth ex rel. Reichelderfer v. Burke, 107 A. 2d 578 (1954), cert. denied, 351 U. S. 942 (1956)
Commonwealth ex rel. Johnson v. Burke, 100 A. 2d 125 (1953)
Commonwealth ex rel. Klinefelter v. Claudy, 93 A. 2d 904 (1953)
Commonwealth ex rel. Swieczkowski v. Burke, 98 A. 2d 229 (1953)
Commonwealth ex rel. Popovich v. Claudy, 87 A. 2d 489 (1952)

Commonwealth ex rel. Reese v. Claudy, 87 A. 2d 492 (1952)

Commonwealth ex rel. Reggie v. Burke, 90 A. 2d 385 (1952)

Commonwealth ex rel. Uhler v. Burke, 91 A. 2d 913 (1952)

Commonwealth ex rel. Palmer v. Ashe, 74 A. 2d 725 (1950), rev'd and hearing ordered, 342 U. S. 134 (1951)

Commonwealth ex rel. Geisel v. Ashe, 68 A. 2d 360 (1949), cert. denied, 338 U. S. 951 (1950)

Commonwealth ex rel. Hovis v. Ashe, 67 A. 2d 770 (1949), affirmed, 70 A. 2d 630 (1950), cert. denied, 339 U. S. 970 (1950)

Commonwealth ex rel. Uveges v. Ashe, 53 A. 2d 894 (1947), rev'd sub. nom., Uveges v. Pennsylvania, 335 U. S. 437 (1948)

Commonwealth ex rel. Piccerelli v. Smith, 27 A. 2d 484 (1942)

See Townsend v. Burke, 334 U. S. 736 (1948) (unreported state decision reversed)

See Gibbs v. Burke, 337 U. S. 773 (1949) (unreported state decision reversed)

See Gryger v. Burke, 334 U. S. 728 (1948) (unreported state decision affirmed)

See Woods v. Cavell, cert. denied, 354 U. S. 911 (1957); See also Pennsylvania ex rel. Woods v. Cavell, 157 F. Supp. 272 (W. D. Pa. 1957) (special circumstances found on federal habeas corpus)

See Kennedy v. Burke, cert. denied, 331 U. S. 842 (1947); See also 176 F. 2d 96 (3d Cir. 1949) (no special circumstances found on federal habeas corpus)

R. I.

Hanley v. Langlois, 175 A. 2d 182 (1961), cert. denied, 368 U. S. 1002 (1962)

S. C.

*State v. Hollman, 102 S. E. 2d 873 (1958)

*Shelton v. State, 123 S. E. 2d 867 (1962)



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Allen, The Supreme Court, Federalism, and Criminal Justice, 8 DePaul L. Rev. 211, 230 (1959) 9
Beaney, "The Right to Counsel in American Courts, Wm. Merritt, Ann Arbor, U. of Mich. Press (1955) 22
Brownell, Herbert, Jr., "The Bill of Rights," 41 Am. Bar Assn. Journal, 517, 521 (1955) 21
Cohen, Benjamin B. and Griswold, Erwin N., letter, New York Times, Sunday, August 2, 1942, § IV, p. 6, cols. 5-7 6n.
Comment, "Prospective Overruling and Retroactive Application in the Federal Courts," 71 Yale L.J. 907 (1962) 23
Equal Justice for the Accused, Doubleday & Co., Inc., Garden City, N.Y. (1959), p. 37 8n., 14n., 24n.
Frank, Jerome N., "Today's Problems in the Problem of Criminal Justice," 15 Fed. Rules 101, 103 (1953) 21, 22

Note, 48 Calif. L. Rev. 501 (1960) 21

Note, 66 Harvard Law Rev. 437 23

Note, 38 Ky. L.J. 316 (1950) 21

Pollock, "Equal Justice in Practice," 45 Minn. L. Rev. 737 (1961) 14, 15

Rawle, A View of the Constitution of the United States of America, H. C. Carney & E. Lea, Philadelphia (1825) 15

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 155.

CLARENCE EARL GIDEON

v.

H. G. COCHRAN, JR., DIRECTOR, DIVISION OF CORRECTIONS.

BRIEF FOR AMICI CURIAE.

INTEREST OF THESE AMICI CURIAE.

The undersigned Attorneys General, representing states with a wide range of historical traditions and sharp variances in their criminal procedures, join in this brief *amicus curiae* in furtherance of a commonly held objective. That objective is to insure that every indigent person accused of any felony in a state court is guaranteed right to counsel. That right, as we shall demonstrate, is indispensable to the idea of justice under law. An essential assumption of our Constitution, it transcends the power of the states to determine their own criminal procedures. Its denial in Florida, or in any other state, is ultimately of grave concern to all states throughout the nation. If its denial has up to this juncture been sanctioned by this Court's holding in *Betts v. Brady*, 316 U.S. 455, then we urge that that holding be reconsidered.

SUMMARY OF THE ARGUMENT.

Betts v. *Brady*, 316 U.S. 455, 462, holds that an indigent accused charged with a non-capital crime in a state court does not, as a matter of due process under the Federal Constitution, have the right to be represented by counsel, unless, upon an appraisal of all the facts of the case, the refusal of counsel constitutes "a denial of fundamental fairness, shocking to the universal sense of justice . . ." Such a holding, at least in regard to felony cases, is at odds with the twentieth century notions of ordered liberty as it comprehends the right to counsel. It ignores the fluidity of historical concepts and fails to take account of historical growth. The language of the due process clause of the Fourteenth Amendment emphatically does not distinguish between a deprivation of life and a deprivation of liberty so long as that deprivation lacks due process; nor do the practical exigencies of the conduct of a criminal trial permit of such a distinction.

Today thirty-five states require counsel in non-capital cases, which is a strong indication of the fundamental nature of that right in the modern view. Since the Sixth Amendment compels appointment of counsel in the federal courts, the absence of a similar compulsion upon the remaining 15 states creates an ugly double standard that is incompatible with a healthy federalism.

Betts v. *Brady* means that the quality of criminal justice in the state courts is lower for the poverty stricken than for one who can afford to pay for it. Such "squalid discrimination" has now been outlawed as a matter of the denial both of due process and of equal protection, even where a fundamental constitutional right has not been involved. But, since the right to counsel for those who can afford one is a fundamental constitutional right, then *a*

fortiori that right can no longer be denied on economic grounds.

The rule of *Betts* v. *Brady* does not make it possible to conduct a trial fairly within the meaning of the advocacy system. For that system, depending as it does on presentation of all considerations on both sides of the case, demands the presence of counsel. Any trial, but particularly a criminal trial, is a highly complex, technical proceeding requiring representation by a trained legal adviser who can securely guide the accused through the maze of pitfalls into which he might otherwise stumble. The layman cannot, for instance, be expected to know procedure, whether to testify, how to cross-examine. The trial judge, who is now required to decide in advance when there will be "fundamental fairness," can never be sure when, during the trial, the need for counsel will arise. Consequently, the rule has been, and is being, inconsistently and confusingly applied, and the appellate decisions are contradictory and almost invariably marked with sharp dissents.

There will be some administrative burdens imposed upon the bench and bar if *Betts* v. *Brady* is reconsidered. But these are not insuperable. By such measures as limiting at this time the constitutional right to counsel to felonies, by requiring certification of the fact of indigence, and by making the new constitutional rule operate prospectively, the problem in respect to the courts can be contained. And by providing state subsidy of defender agencies, expanding private charitable and educational facilities for defender services, and adopting a more comprehensive and systematic approach to the problem in the bar associations, the lawyers can fulfill their obligations. Potential constitutional questions raised by the right to counsel for misdemeanors or the quality of representation are not before the Court in this case.

ARGUMENT.

I. The Holding in Betts v. Brady Runs Counter to the Historical Development of the Right to Counsel and Offends the Notion of Due Process of Our Day.

A. Due Process in the Light of the Historical Development of the Right to Counsel.

"Due process" is not a sterile and fixed conception. On the contrary, it is what Learned Hand has denominated the "mood" of our society—"that sense of moderation, of fair play, of mutual forbearance . . ." *Daniel Reeves, Inc., v. Anderson*, 43 F. 2d 679-682 (1930). It is whatever from time to time is "implicit in the concept of ordered liberty". (Cardozo, J., in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)), "perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society." Frankfurter, J., in *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956).

The requisites of an ordered liberty are far more multifarious and complex in 1962 than they were when the Bill of Rights was enacted or the Fourteenth Amendment adopted. Examples come easily. Thus in a simpler society the term "property" could be generally limited to assets that were tangible and physical, or at least could be symbolized by something tangible or physical, such as a covenant or bond. In the twentieth century even the opportunity to engage in a possible profit-making enterprise constitutes a property within the broad compass of the due process clause. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917). Punishments that were commonplace in 1791 may well be adjudged unconstitutionally cruel and unusual today. *Trop v. Dulles*, 356 U.S. 86 (1958). *Weems v. United States*, 217 U.S. 349 (1910). The secret ballot,

unknown in the eighteenth century, is a constitutionally protected liberty in the twentieth. *Sacco v. New Hampshire*, 354 U.S. 234, 266 (1957). The right of a defendant in a criminal case to testify in his own behalf—specifically denied in the eighteenth century—is part of due process in the twentieth. *Ferguson v. Georgia*, 365 U.S. 570 (1961).

But the determination of the accused's constitutional right to counsel affords perhaps the most dramatic example yet of how this Court has determined due process "by the gradual and empiric process of 'inclusion and exclusion.'" The historical development of that determination needs no detailed treatment here, for, ironically, it had been spelled out fully by Mr. Justice Roberts in *Betts v. Brady*. There he shows how originally in England a prisoner was obliged to try his case himself rather than by counsel; how the English common law had commenced to sanction the practice of permitting the accused to have counsel; how by 1695 in treason cases and by 1836 in felony cases the accused was awarded the right by statute to be heard by counsel; and how by 1932 due process required a state to expend its funds to provide counsel to a defendant at least in capital cases. However, he was unable to conclude that these historical antecedents compel anything more than a prohibition against state rules which deny representation by counsel in criminal procedures. They did not go so far as to impose the duty upon the states to provide representation for the indigent in all serious but non-capital cases.

Betts v. Brady, then, determines that one hundred and seventy years of experience points to a contracting rather than an expanding meaning of the right to counsel in a democracy in the twentieth century. Two distinguished commentators long ago suggested that its historical arguments go so "dangerously and troublesomely far" as to "support the conclusion that even the Sixth Amendment

does not compel the Federal Government to provide counsel for indigent defendants in Federal prosecutions."[1]

Subsequent decisions of this Court involving indigent criminal defendants of course have persistently whittled away at this curious doctrine. Here, too, examples come easily. See *Rice* v. *Olson*, 324 U.S. 786 (1945) (ignorant Indian); *Wade* v. *Mayo*, 334 U.S. 672 (1948) (inexperienced youth); *Townsend* v. *Burke*, 334 U.S. 736 (1948) (overreaching by prosecutor and bench); *Palmer* v. *Ashe*, 342 U.S. 134 (1951) (mental defective); *Massey* v. *Moore*, 348 U.S. 105 (1954) (insane); *Moore* v. *Michigan*, 355 U.S. 155 (1957) (young Negro, insanity defense); *Cash* v. *Culver*, 358 U.S. 633 (1959) ("uneducated farm boy of 20"); *Hudson* v. *North Carolina*, 363 U.S. 697 (1960) (co-defendant's counsel withdrew); *McNeal* v. *Culver*, 365 U.S. 109 (1961) (ignorant, inexperienced Negro).

When the *Betts* v. *Brady* rule has been applied to affirm a conviction it has been done with reluctance and usually by a closely and sharply divided Court. See *Foster* v. *Illinois*, 332 U.S. 134 (1947) (5-4); *Bute* v. *Illinois*, 333 U.S. 640 (1948) (5-4); *Gryger* v. *Burke*, 334 U.S. 728 (1948) (5-4); *Quicksall* v. *Michigan*, 339 U.S. 660 (1950) (7-1).

B. The Notion of Due Process does Not Distinguish between Denial of Life and Denial of Liberty, and a Holding Based on Such a Distinction is Wrong.

Powell v. *Alabama*, 287 U.S. 45 (1932), has clearly established the principle that, in state court proceedings involving a capital offense, due process of law is inevitably denied a defendant who is without assistance of counsel, unless he has knowingly and understandingly waived his right

[1] See letter of Benjamin B. Cohen and Erwin N. Griswold, New York Times, Sunday, August 2, 1942, § IV, p. 6, cols. 5-7.

to counsel. *Betts v. Brady* establishes the notion that a distinction can be made between capital and non-capital cases, in that, where a non-capital case is involved, the Court will review the trial proceeding to determine if the absence of counsel did in fact result in an "unfair trial" for the defendant.

But what justification can be offered for the distinction between non-capital and capital cases in the context of a defendant's right to counsel?[2] What does "fairness of trial" have to do with the degree of punishment? This Court has said in *Powell v. Alabama*, 287 U.S. 45, that "the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment" (287 U.S. at 71). It said this without reference to the trial procedures and circumstances of the case, but rather indicated that absence of counsel is in essence a denial of due process. The *Betts* distinction between capital and non-capital cases constitutes a clear implication that a denial of life without due process is somehow on a different footing from denial of liberty.

1. The Language of the Fourteenth Amendment is Plain.

The Fourteenth Amendment, however, makes no such distinction. Its definition of "due process" is not varied or qualified by whether it was life or liberty of which a defendant has been deprived. When it is applied, one looks to see (1) if there has been a deprivation of life, liberty

[2] Certainly no justification in the context of the accused's status? Thus *Kinsella v. Singleton*, 361 U.S. 234 (1959), holds that no constitutional distinction could be drawn between capital and non-capital offenses in determining that a civilian cannot be tried in peace time by a court martial.

or property, and (2) if that deprivation was accompanied by due process. These are the two separate factors or criteria in this part of the Amendment. Life and liberty stand on the same footing and belong in the same category. In the effort to determine whether there has been a denial of due process in a particular case, a determination of whether it was life or whether it was liberty which was deprived is irrelevant under the words of the Amendment.

2. The Distinction does Not Practicably Exist.

An exhaustive study of the various practices throughout the United States of furnishing legal representation in the criminal courts to those who cannot afford a lawyer was recently undertaken by the Association of the Bar of the City of New York and The National Legal Aid and Defender Association. The conclusion of that report included the statement that "The Special Committee to study defender systems is convinced that justice cannot be equal and accessible for all unless every defendant brought into criminal courts is represented by counsel."[1]

This conclusion admits of no distinction between capital and non-capital cases and shows one of the basic reasons for this Court's holding that due process of law was absent in *Powell* v. *Alabama*. The Court there said: "Even the intelligent and educated layman has small and sometimes no skill in the science of law." 287 U.S. at 69. Mr. Justice Douglas has observed in his dissenting opinion in *Bute* v. *Illinois*, 333 U.S. 640, 677 (1948): "But to draw the line between this case [entailing the possibility of twenty years'

[1] Equal Justice for the Accused, Doubleday & Co., Inc., Garden City, N.Y. (1959), a report by The Special Committee of the Association of the Bar of the City of New York and The National Legal Aid Association.

imprisonment and cases where the maximum penalty is death is to make a distinction which makes no sense in terms of the absence or presence of *need* for counsel." 333 U.S. at 682. As the eminent authority on criminal law, Professor Francis Allen, has pointed out

> "If the rights of counsel are deemed an inherent part of the concept of 'fair hearing,' as has been consistently asserted by the Court since the Powell case, the crucial inquiry would seem to be, not so much the penalties imposed on the defendant upon conviction, but the *need* for skilled representation in the proceedings directed to the establishment of guilt. There is little basis for the belief that trials of capital cases, in general, produce greater need than trials of several other categories of serious, non-capital felonies. Most experienced defense lawyers would probably testify that a murder prosecution, which may result in imposition of the death penalty, is not by any means ordinarily the case most difficult to defend. Indictments charging the accused with such crimes as embezzlement, confidence game, or conspiracy, are likely to place the unrepresented defendant in a far more helpless position. The rule, therefore, seems vulnerable to fundamental criticism." Allen, The Supreme Court, Federalism, and Criminal Justice, 8 DePaul L. Rev. 211, 229-230 (1959).

C. Due Process in the Light of State Practices to Date.

Conceiving due process as an evolutionary concept subject to the changing influences of society, this Court has indicated that it is valid to inquire into the laws and to examine the procedures of the several states as a step in deciding the factors of due process which ought to be im-

posed today upon the states. Such inquiries were made and were fundamental to the holdings of *Powell v. Alabama*, 287 U.S. 45, 73 (1932); *Wolf v. Colorado*, 338 U.S. 25, at 33-39 (1949); *Elkins v. United States*, 364 U.S. 206, at 224-232 (1960); and *Mapp v. Ohio*, 367 U.S. 643 (1961), at 651, 652. See also *Crooker v. California*, 357 U.S. 433, 448 (1958).

Most recently this was done in *McNeal v. Culver*, 365 U.S. 109, 121 (1961). In the appendix to his opinion Justice Douglas tabulated the states as to their requirements in the context of assigned counsel. That appendix is still accurate and reveals that thirty-five states now require the appointment of counsel in non-capital cases.[3] Such a solid majority of the states, in endorsement of the non-capital assigned counsel principle, indicates that the principle is indeed a fundamental part of the concept of due process of law.[4]

As Justice Sutherland said, in noting that every state in the Union requires appointment of counsel in capital cases, in *Powell v. Alabama*: "A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed, at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right." 287 U.S. at 73. The argument as to the fundamental and inherent nature of the right to assigned counsel in felony cases accords precisely with the reasoning accepted by the Court in *Powell v. Alabama*. And though the current tabulation reveals less than unanimity among the states, it is certainly a stronger indication of the modern view of due process in the right-to-counsel context than was the practice of the states in excluding illegally obtained evidence in the search-and-seizures context. See *Mapp v. Ohio, supra*.

D. A Double Standard is Created Between the Federal and the State Courts

The constitutional right to counsel for the indigent accused in the federal courts is sternly commanded and unequivocally provided for:

> "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or *liberty*." (Emphasis supplied.) *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938).

> "If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by *habeas corpus*." 304 U.S. at 468.

> "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him *at every stage of the proceeding* unless he elects to proceed without counsel or is able to obtain counsel." (Emphasis supplied.) Rule 44, Federal Rules of Criminal Procedure.

Now, as state entities ourselves, nobody could be more committed to the proposition that "The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." *Elkins v. United States*, 364 U.S. 206, at 221 (1960). This Court, both in *Elkins v. United States* and in *Mapp v. Ohio*, 367 U.S. 643 (1961), thoroughly considered the double standard that exists when state practices do not measure up to the

federal requirements. Although these two cases dealt with problems of crime solution, their teaching in respect to the "hazardous uncertainties of our heretofore ambivalent approach" (*Mapp* v. *Ohio*, at 658) is applicable to the problem of counsel for the indigent accused. It is enough that it is we states, not the federal establishment, who must presently smart under Anatole France's lash: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread" (quoted by Justice Frankfurter in *Griffin* v. *Illinois*, 351 U.S. 12, 23 (1956)). Somehow there is something doubly ignoble about subjecting an accused to the danger of conviction for lack of ability to hire counsel in the state court when, perhaps across the street in a different courthouse, he would be entitled to this protection as a fundamental right under the Sixth Amendment.

II. The Holding in Betts v. Brady Makes the Quality of Criminal Justice Dependent upon the Accused's Capacity to Pay for It.

A. Griffin v. Illinois and Burns v. Ohio Are Conclusive of the Point.

"There can be," this Court has said, "no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v. *Illinois*, 351 U.S. 12, at 19 (1956). So firm is the attachment of the undersigned states to that principle that we could confidently rest our case on that assertion alone.

For the Constitution now requires that, where a state, in non-capital criminal matters, gives a right to those defendants who are able to afford the costs preliminary to an exercise of that right, the state must likewise provide accessibility to the right to defendants not able to afford the preliminary prerequisites. *Griffin* v. *Illinois*,

supra, and *Burns* v. *Ohio*, 360 U.S. 252 (1959), and the main opinion in *Griffin* v. *Illinois*:

> "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' . . . *In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.*" (Emphasis supplied.) 351 U.S. at 17.

Concurring with this sentiment, Justice Frankfurter said in his separate opinion: "The State is not free to produce such a squalid discrimination." 351 U.S. at 24.

The significant thing here is that the right of appeal is not *per se* constitutionally required by the due process clause. Indeed, *Griffin* v. *Illinois* explicitly states otherwise. 351 U.S. at 18 and 21. Yet that right cannot be made to depend upon the accused's financial ability to pay for it. On the other hand, the right to counsel for those who can afford one *does* come within the compass of the due process clause. *Chandler* v. *Fretag*, 348 U.S. 3 (1954). Clearly, if the loss on account of poverty of a right not constitutionally protected now constitutes a denial of equal protection, *a fortiori* the loss of a right that is constitutionally protected is such a denial.

III. The Rule of Betts v. Brady is Inherently Unworkable by a Trial Court in an Adversary System and Incapable of Consistent Application by Appellate Courts.

A. The Rule is Inherently Unworkable by a Trial Court.

The adversary system is one of the glories of Anglo-American jurisprudence, but it rests on the presupposition

that competent advocates will fully bring forth all considerations on each side of the case. If the old maxim, "He who represents himself in litigation has a fool for a client," retains any meaning, it is most poignantly applicable in a criminal proceeding, where one's very liberty is at stake.[4] A lawyer long acquainted with the indigent defendant problem has written that to try a criminal defendant without counsel is to place him *ipso facto* in a position of prejudice and "is to abandon the adversary system." His arguments are unanswerable:

> "I have witnessed the agonizing scene in which an unrepresented defendant is asked by the court or the district attorney if he wishes to cross-examine a witness for the prosecution. Instead of asking a question of the witness in the proper form, the accused, startled and confused, makes a statement contradicting the testimony of the prosecuting witness . . . This . . . brings forth sharp official rebuke which quickly ends the defendant's abortive attempt at cross-examination.
>
> "I have heard a judge presiding over the trial of a criminal case inadvertently misquote the governing law to the serious detriment of the unrepresented defendant. And I have observed the district attorney preoccupied with the next case, remain silent while an excessive and illegal sentence was imposed on the uncounselled defendant whose interest he had said earlier in the proceeding he would protect . . . The Judge usually spends only a small portion of his time in criminal court and cannot be expected to be fully informed on the law of the immediate case. The district at-

[4] "Thus, the defendant without counsel is unable to avail himself of the benefits of the adversary system, and the premise upon which that system rests is impaired." Equal Justice for the Accused, Doubleday & Co., Inc., Garden City, N.Y. (1959), p. 37.

> torney, conditioned by his official experience to view a criminal case from the standpoint of the prosecution, is not apt to think in terms of *moves, defenses and laws favorable to the defense.* [Emphasis supplied.]
>
> ". . . The uncounselled defendant . . . cannot be advised properly by the district attorney or the court on the crucial questions of plea or as to whether to submit his case to a jury or to a judge . . . , and he cannot during the progress of a trial confer and consult privately with the district attorney or the court.
>
> "The need for a lawyer at the sentencing of a defendant who pleads guilty or is found guilty may be even greater than the need at arraignment or trial . . . the sentencing structure is complicated and not easily understood even by lawyers. Pollock, "Equal Justice in Practice," 45 Minn. L. Rev. 737 (1961).

Any trial is a complex and specialized business, but a criminal trial can be particularly fearful. As far back as 1825 William Rawle, himself a former federal prosecutor, observed that—

> "[T]he most innocent man, pressed by the awful solemnities of a public accusation and trial, may be incapable of supporting his own cause. He may be utterly unfit to cross-examine the witnesses against him, to point out the defects of their testimony, and to counteract it by properly introducing and applying his own. Hence the importance, we might say, the right, of having the aid of men educated and accustomed to manage criminal trials, to whose knowledge and skill he may safely commit the conduct of his defense." Rawle, A View of the Constitution of the United States of America, H. C. Carney & I. Lea, Philadelphia (1825).

How to plead and testify at arraignment,[5] motions for specifications, examination of prospective jurors on *voir dire*, whether to take the stand in one's behalf, how to establish alibis or run down other leads that the testimony may turn up, the interposition of objections, the scope of cross-examination, the submission of proposed instructions to the jury, objections to instructions that were given, establishing the validity of the sentence, whether and how to claim an appeal—one could go on for many pages. As was said by this Court in *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932), "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . Even the intelligent and educated layman has small and sometimes no skill in the science of law." Layman, indeed—many an experienced lawyer—will quite frankly concede his incapacity to cope with the exigencies of a criminal trial. The special difficulties of a Florida jury trial have been recently spelled out at length by Mr. Justice Douglas in his concurring opinion in *Carnley* v. *Cochran*, 369 U.S. 506, 524 (1962), 82 S. Ct. 884, 892 (1962), who then went on to say:

> "Intricate procedural rules are not restricted to criminal trials in Florida. Similar rules, equally as complex and confusing to the layman, may be found in the criminal statutes of the other States. . . . the rule of *Betts* v. *Brady* projected in a jury trial faces a layman with a labyrinth he can never understand nor negotiate.

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[5] We assume that, except perhaps in the circumstances of *Crooker* v. *California*, 357 U.S. 433 (1958) (that defendant was an intelligent thirty-one-year-old college graduate with one year of law school training), the constitutional right to representation includes representation at the arraignment. See *Hamilton* v. *Alabama*, 368 U.S. 52 (1961).

> "As a result, the jury system—pride of the English-speaking world—becomes a trap for the layman because he is utterly without ability to make it serve the ends of justice."

It is, of course, true that in the past, under the *Betts* v. *Brady* "shocking to the universal sense of justice" standard, some accused who have fallen into one or more such pitfalls have been rescued when this or some lower tribunal has looked back to see if injustice in fact resulted; *e.g., United States ex rel. Savini* v. *Jackson*, 250 F. 2d 349 (2d Cir. 1957) (rape case in which the appellate court said the charge was too complex for waiver of counsel by guilty plea). Recently, moreover, there has been a condition for imposition of the standard recently decided by this Court which seems to go a long way towards further rescue. That is the requirement in *Cash* v. *Culver*, 358 U.S. 633, 637 (1959), that counsel is required if injustice is "apt to result." This means that the *Betts* v. *Brady* test must now be applied through the perspective of the trial judge, not the reviewing appellate judge.

But it is difficult to comprehend how, as a practical matter, a trial judge can do this with the degree of consistency presupposed by a judicial determination placing the onus of such decisions upon him. In the first place, in a felony case it is highly unlikely that there is one trial judge as such: different judges may preside at the arraignment, at the grand jury session, possibly at pre-trial motions, if any, and at the trial itself. How can the judge in the arraignment session anticipate what is to come up in trial? How is the trial judge to know what crucial matters transpired at the arraignment which thenceforth require counsel? If the proof of an alibi in improper formulation of questions is extremely difficult to establish, or if the accused gets

enmeshed in seeking to examine or cross-examine, is the judge expected to stay proceedings in order to bring in defense counsel? Suppose the trial proceeds without incident until the sentencing stage, at which point complicated problems of law arise: will counsel at that time be ordered in? Take *Hudson* v. *North Carolina*, 363 U.S. 697 (1960). Could the trial judge there possibly have anticipated that the defendant with counsel would plead guilty in mid-trial and thereby prejudice his remaining co-defendants? and that the counsel would thereupon withdraw from the case as the result of its disposition, and thereby deprive the remaining co-defendants of the advice that he had promised to offer gratuitously, coincident with the defense of his own client?

To pose such questions is to provide the answer. Obviously there can be no semblance of uniformity in the conduct of such proceedings, for the very matter which will shock the conscience of one judge will fail to penetrate the repose of another. As we have indicated, even before *Cash* v. *Culver*, the judges of the highest court of this land have often divided 5 to 4 on whether an indigent accused's possible trial was a "denial of fundamental fairness." It is now most unrealistic to expect that the trial judges, looking ahead, can accomplish that which has obviously been so disturbing to this Court from the vantage point of looking back.

But, it will be asserted, the trial judge will outdo himself to see that the unrepresented accused is protected. We assume, with Mr. Justice Douglas in *Carnley* v. *Cochran*, 369 U.S. 506 (1962), 82 S. Ct. 884, 894 (1962), that criminal rules might not be applied by a judge "with the same vigor against a layman defending himself as they would against one represented by a lawyer." On the other hand, they might. In any event, to impose this obligation on any judge is, again, to negate the meaning of the adversary tradition.

Mr. Justice Butler a generation ago put it perhaps as well as anyone:

> "But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional." *Powell* v. *Alabama*, 287 U.S. 45, 61 (1932).

B. The Rule is Incapable of Consistent Application by Appellate Courts.

The twenty years' accumulation of confusion and contradictions in the reviewing courts' decisions under *Betts* v. *Brady* amply demonstrates how utterly has "shocking to the universal sense of justice" failed as a beacon to guide trial judges. An exhaustive catalogue of these decisions is not necessary here, because Mr. Justice Black has provided one in his concurring opinion in *Carnley* v. *Cochran*, *supra*, pp. 891-892. A comparison of three pairs of cases cited in the concurring opinion will illustrate the inconsistencies which have come about as a result of the application of the *Betts* v. *Brady* standard:

(1) *Flausburg* v. *Kaiser*, 55 F. Supp. 959 (W.D. Mo. 1944), aff'd on other grounds, 144 F. 2d 917 (8th Cir. 1944) (capital crime in which counsel was not appointed).

Powell v. *Alabama*, 287 U.S. 45 (1932) (capital crime in which counsel was appointed).

(2) *Parker* v. *Ellis*, 258 F. 2d 937 (5th Cir. 1958) (forgery case in which defendant said he was too sick to defend himself—counsel denied).

Massey v. *Moore*, 348 U.S. 105 (1954) (defendant insane—counsel appointed).

(3) *Henderson* v. *Bannan*, 256 F. 2d 363 (6th Cir. 1958) (rape case in which appellate court said defendant had competently waived counsel by his guilty plea).

United States ex rel Savini v. *Jackson*, 250 F. 2d 349 (2d Cir. 1957) (rape case in which appellate court said charge was too complex for waiver of counsel by guilty plea).

Although each set of cases contained within itself substantially similar fact situations, the right to appointed counsel was denied in the first case of each pair, but upheld in the second—clearly a consequence of the vague standard of "denial of fundamental fairness" which *Betts* has advanced.

Moreover, all defendants convicted without representation cannot possibly obtain appellate review, or, if they do, there is no assurance that the record will be adequate for review. For transcripts are unavailable, witnesses have disappeared, memories have failed. In any case the results here, too, are uneven.[6]

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[6] For example, in the Commonwealth of Massachusetts the mandatory requirement for stenographers in felony cases was provided only seven years ago. G.L. c. 278, § 33A, as amended by chapter 352 of St. 1955. Cf. *Palmer* v. *Ashe*, 342 U.S. 134 (1951), where a seemingly dull-witted defendant without counsel successfully challenged his conviction in a habeas corpus proceeding commenced eighteen years after.

IV. The Burden Imposed upon the Courts and Bar by Reconsideration of Betts v. Brady is Manageable.

A. The Burden on the Courts.

We repeat that we are limiting our claim to the constitutional right to representation for felonies. *Gideon* v. *Cochran* is a felony case, and the question of the right to obtain counsel in misdemeanors is not before this Court. Concededly the question of the right to obtain counsel in misdemeanor cases might be foreseen as the troublesome next step, not that it follows that misdemeanor cases are likely to reach this Court. See Note, 48 Calif. L. Rev. 501 (1960). As of this time, in any event, the experience of the states justifies the restriction of the right to serious charges. See *Gholson* v. *Commonwealth*, 308 Ky. 82, 212 S.W. 2d 537 (1948); Note, 38 Ky. L.J. 316 (1950). Also the question of adequacy of representation will some day present a problem to this Court. A former United States Attorney General has asserted that "voluntary acceptance of assignments as defense counsel, without compensation, is as outmoded as a volunteer fire department in modern society." Herbert Brownell, Jr., "The Bill of Rights," 41 Am. Bar Assn. Journal, 517, 521 (1955). And representation alone does not solve the problems of the indigent accused, for there may be other vital expenses, such as the travelling expenses, daily fees and subsistence of witnesses. And, as for expert witnesses, one of our most perceptive judges once wrote:

> "[A] man may be jailed for life, or even electrocuted, because he hasn't the money to discover a missing document necessary to win his case or to employ a competent hand-writing expert or psychiatrist. This is not democratic justice. It makes a farce of 'equality before the law,' one of the first principles of a democ-

racy." Jerome N. Frank, "Today's Problems in the Problem of Criminal Justice," 15 Fed. Rules 101, 103 (1953).

Manifestly a determination by this Court that the Constitution requires representation in felony cases poses difficult problems about those now serving sentences in which the right to counsel was not recognized. As to this problem, two alternative courses seem to be open. First, of course, this Court or the state courts might proceed on the assumption that, since the constitutional requirements have become clear, all persons are entitled to be heard on the issue of whether the process by which they were convicted satisfied the standards now established. Doubtless it will appear that some defendants now in prison with relatively long sentences still to serve are entitled to new trials. We are aware that after *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), the federal courts in certain districts were confronted by a very large number of petitions for *habeas corpus*. Though the responsibility to consider these petitions and in some cases to retry old charges was onerous, the courts managed to dispose of them, convinced, evidently, that it was wiser to make the new constitutional guaranty fully effective than to protect themselves from a flood of cases. See Beaney, "The Right to Counsel in American Courts, Wm. Merritt, Ann Arbor, U. of Mich. Press (1955). The number of cases in which new trials must be ordered will be significantly reduced, however, if due regard is given to the principle of waiver and to the requirement that the convict must show that he was unable to afford counsel of his own choosing.

There is another alternative, which in many ways seems more desirable. That is for this Court to determine that, since the standards which it establishes are dependent, not

upon the specific intention of the framers of the Constitution, but upon the lessons of experience, it is appropriate not to give those standards retroactive effect. Mr. Justice Frankfurter indicated that such a judicial limitation on the effect of new constitutional doctrine is permissible, and perhaps desirable, in *Griffin* v. *Illinois*, 351 U.S. 12, 25-26 (1958). The solution suggested by Mr. Justice Frankfurter, though it was rejected by the Illinois Court in the *Griffin* case itself (*People* v. *Griffin*, 137 N.E. (2d) 485), has been acted upon in similar circumstances by many courts. See, *e.g.*, *Durham* v. *United States*, 214 F. 2d 862, 874; Note, 60 Harvard Law Rev. 437. See also Comment, "Prospective Overruling and Retroactive Application in the Federal Courts," 71 Yale L.J. 907 (1962).

With respect to the matter of future prosecutions, the problem is entirely manageable. By the exercise of the rule-making powers of the courts, they will be enabled to find adequate and fair means of solving the problem of representation.

B. The Burden on the Bar.

The effect of obligatory representation in felony cases will concededly impose a difficult but not insurmountable burden on the bar. The Legislatures in many states will have to act to set up an office of the public defender or its equivalent.[7] If so, it will not be the first time legislative

[7] In Massachusetts, in 1958, after consideration of two cases involving the right of indigent defendants to representation in a felony case, the Supreme Judicial Court, under its rule-making powers, issued General Rule 10, requiring representation in all felony cases tried in the Superior Court. This was followed in 1960 by the enactment of G.L. c. 221, § 34D, establishing the Massachusetts Defenders Committee, a state agency.

action has become a necessary consequence of a decision of the Court. Consider the legislative aftermath of *Baker* v. *Carr*, 369 U.S. 186 (1962).

The English solution suggests one way of coping with the problem. In that country indigents have been allowed to select counsel from a list of attorneys who have agreed to serve and who receive compensation from the government for the services they render. Legal Aid and Advice Act, 12 & 13 Geo. 6, c. 51.

The State, City and County Bar Associations in many instances will have to bestir themselves. A vast expansion of the services of charitable organizations such as Legal Aid seems plainly indicated. Law schools of the nation can prove of immense help.[8] The interstices will have to be taken up by voluntary assignment and court appointment.[9]

CONCLUSION.

Betts v. *Brady*, already an anachronism when handed down, has spawned twenty years of bad law. That in the world of today a man may be condemned to penal servitude for lack of means to supply counsel for his defense is unthinkable. We respectfully urge that the conviction below be reversed, that *Betts* v. *Brady* be reconsidered, and that this Court require that all persons tried for a felony in a

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[8] See, for example, Massachusetts Supreme Judicial Court General Rule 11 providing for representation of indigents in lower courts by supervised senior students of accredited law schools.

[9] The present scope of these amelioratives is described in Equal Justice for the Accused, Doubleday & Co., Inc., Garden City, New York (1959).

state court shall have the right to counsel as a matter of due process of law and of equal protection of the laws.

Respectfully submitted,

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GERALD A. BERLIN,
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On Behalf of All Attorneys General.

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No. 155

In the

Supreme Court of the United States

October Term, 1962

CLARENCE EARL GIDEON,

Petitioner,

v.

H. G. COCHRAN, JR., DIRECTOR
DIVISION OF CORRECTIONS,

Respondent.

AMICUS CURIAE BRIEF FOR THE STATE OF ALABAMA PRESENTED BY ITS ATTORNEY GENERAL, MacDONALD GALLION

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INTEREST OF THE AMICUS CURIAE

In granting the motion to proceed *in forma pauperis* and the petition for writ of certiorari, this Court requested counsel to discuss the following in their briefs and oral argument:

> "Should this Court's holding in *Betts v. Brady*, 316 U.S. 455, be reconsidered?"

Because of the importance of the question, Honorable Richard W. Ervin, Attorney General, State of Florida, invited the attorneys general of other states to submit amicus curiae briefs on this point.

ARGUMENT

I

In *Betts v. Brady* (1942), 316 U.S. 455, it was decided that the due process clause of the Fourteenth Amendment of the Constitution of the United States was not violated by the State of Maryland's refusal to accede to the accused's request and appoint counsel in that state's prosecution for a non-capital offense. The Court recognized that the question whether or not counsel should be appointed for indigents in state trials involving non-capital crimes is a matter which addresses itself to the considered judgment of the people, the legislatures and the courts of the individual and sovereign states of our Union. It was a reaffirmation of the principle, adopted in earlier decisions of this Court, that the first ten amendments to the federal constitution were not intended to limit the powers of the state governments in respect to their own people and affairs, but were designed to operate on the national government alone. *United States v. Dawson* (1853), 15 How. 467, 487; *Twitchell v. Pennsylvania* (1868), 7 Wall. 321, 325; *Ex parte Spies* (1887), 123 U.S. 131, 166; *Ex parte Sawyer* (1887), 124 U.S. 200, 219; *Brooks v. Missouri* (1887), 124 U.S. 394, 397; *Eilenbecker v. District Court* (1889), 134 U.S. 31, 34, 35; *West v. Louisiana* (1903), 194 U.S. 258, 262; *Howard v. Kentucky* (1905), 200 U. S. 164, 172.

It is true that times and conditions have changed since the cited cases were decided. However, to argue that such changes have outmoded the rationale of those decisions may well be compared with an assertion that time has rendered obsolete the principles of the Magna Charta. The validity and cogency of their reasoning and logic remain constant.

To overrule *Betts v. Brady* and hold that the due process

clause of the Fourteenth Amendment, makes the Sixth Amendment applicable to the individual states would be an unwarranted assault upon the Tenth Amendment which provides that the powers not delegated to the United States by the national constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. Safeguards guaranteed by one amendment to the constitution are no more sacred than those protected by another. This Court should not favor the Fourteenth at the expense of the Tenth.

On numerous occasions this Court has ruled that the due process clause of the Fourteenth Amendment does not protect in state trials, by virtue of its mere existence, the accused's freedom from giving testimony by compulsion that is secured to him against federal interference by the Fifth Amendment of the federal constitution. *Twining v. New Jersey*, 211 U.S. 78; *Palko v. Connecticut*, 302 U.S. 319; *Knapp v. Schweitzer*, 357 U.S. 371. If, insofar as the states are concerned, the due process clause of the Fourteenth Amendment does not prevail over the Fifth Amendment, then there is no valid or logical reason why it should subjugate either the Sixth or Tenth Amendments.

The purpose of our nation's founding fathers was expressed clearly by this Court in *Barron v. Baltimore*, 7 Pet. 243, where Mr. Chief Justice Marshall declared:

> ". . . The [United States] Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a Constitution for itself, and in that Constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situa-

> tion and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself. . .
>
> "These [the Fifth and Sixth] amendments contain no expression indicating an intention to apply them to state governments. This Court cannot so apply them."

This, we think, is a substantial reason for upholding the rule of *Betts v. Brady*, which stands for the principle that the Fourteenth Amendment does not make the Sixth Amendment applicable to the states. It is the essence of our federalism that states should have the widest latitude in the administration of their own systems of criminal justice. *Cicenia v. Lagay*, 357 U.S. 504, 510; *Hoag v. New Jersey*, 356 U.S. 464, 468.

II

Two members of the present Court, Mr. Justice Black and Mr. Justice Douglas, dissented when *Betts v. Brady* was decided in 1942, expressing their opinion that the Fourteenth Amendment made the Sixth applicable to the states. Their recent views, expressed in separate concurring opinions in *Carnley v. Cochran*, No. 158, October Term, 1961, decided April 30, 1962, U.S. , 82 S.Ct. , 8 L.Ed.2d 70, wherein this Court held that because of the factual situation there involved, Florida's denial of counsel to an indigent tried for a non-capital offense violated the Fourteenth Amendment, warrant close inspection.

In *Carnley v. Cochran*, Mr. Justice Black observed that twenty years' experience with the rule of *Betts v. Brady*, namely, that an indigent defendant charged with crime in a state court does not have a federal constitutional right to be provided with counsel unless this Court can say by an appraisal of the totality of the facts in a given case that the

refusal to provide counsel for the particular defendant constitutes "a denial of fundamental fairness shocking to the universal sense of justice," has demonstrated its basic failure as a constitutional guide. As he views it, the rule has served not to guide but rather to confuse the courts as to when a person prosecuted by a state for crime is entitled to a lawyer, and has imposed upon courts a perplexing responsibility. He points out that as the years have gone on, this Court, under the *Betts v. Brady* rule has been compelled to reverse more and more state convictions, thus demonstrating, to him, a growing recognition that our Bill of Rights is correct in assuming that no layman should be compelled to defend himself in a criminal prosecution. He complains that all defendants who have been convicted of crime without the benefit of counsel cannot possibly bring their cases to this Court. And he concludes by stating that he would overrule *Betts v. Brady*, would return to the holding in *Powell v. Alabama*, 287 U.S. 45, and would hold that, under the Fourteenth Amendment, all defendants prosecuted for crime are entitled to counsel whether it is their life, their liberty, or their property which is at stake in a criminal prosecution.

Admittedly, on that distant day when finally the millenium is reached, no layman shall be compelled to defend himself without legal assistance in a state criminal prosecution. No indigent individual shall be compeled to suffer illness or injury without the attention of a physician or benefit of necessary medicine or hospital care. No poor person shall be compelled to suffer the pangs of hunger or the discomforts occasioned by a lack of adequate clothing, suitable housing or other creature comforts. Humanitarian principles require that such assistance be given to the needy even today, but it cannot be argued logically that, under the due process or equal protection clauses of the Fourteenth Amendment, the states must furnish them. If and when, in the considered

judgment of the people of the individual states, such gratuitous services or aid are warranted morally or are feasible financially, they will be provided. Though man's social evolution is slow, history proves that he does advance in all fields. To be lasting, however, his progress must result from his own volition rather than come from judicial fiat.

The rule of *Betts v. Brady*, that counsel must be appointed when a failure to do so would be "shocking to the universal sense of justice," is no more vague, fickle, or confusing as a standard than is the nationally accepted requirement that before a person can be convicted of crime, the state must convince the court or jury of his guilt "beyond a reasonable doubt and to a moral certainty." Undoubtedly, many juries have been perplexed and confused by these vague terms and have caused miscarriages of justice; but seldom, if ever, has this point been argued as a ground for abolishing the jury system which Mr. Justice Douglas, in *Carnley v. Cochran*, describes as the "pride of the English-speaking world."

Undoubtedly, this Court has observed some cases where the failures of state trial judges to appoint counsel have shocked its sense of justice. Disregarded, however, is the fact that of the multitude of criminal trials which have been conducted in state courts throughout the nation, absent the assistance of defense counsel, only a relatively few have been attacked successfully on the ground that they were "shocking to the universal sense of justice." No claim is made that our state judges are perfect. They, even as do members of the federal judiciary, labor under the limitations and shortcomings imposed on mortal men. We do insist, however, that, by and large, state judges are intellectually and morally capable of fulfilling the duties of their offices and are sincere and conscientious in their efforts to see that all litigants who come before them are afforded justice

under the law. This is true with respect to the appointment of counsel for indigents charged with crime. Some errors are made; but, frequently, even those cases which this Court has seen fit to reverse because counsel were not appointed, afford grounds for honest differences of opinion.

Title 28, Section 1915, United States Code, and this Court's own Rule 53 refute Mr. Justice Black's charge that, "all defendants who have been convicted of crime without benefit of counsel cannot possibly bring their cases to us." In recent years there has been a growing trend among the states to expand the rights of indigent prisoners who seek relief from their convictions in the state appellate courts; and, particularly in the past few years, few, if any, state prisoners have been unaware of their right to proceed in the federal courts *in forma pauperis*. Casual inspection of the several state and federal reporter systems reflect the voluminous number of habeas corpus, coram nobis, and other proceedings which have been instituted by state prisoners throughout this country. The means for even indigent state prisoners bringing their cases to this Court exist, and the records of this Court will show that there is no hesitancy, reluctance, inability, or lack of ingenuity on the part of state prisoners to employ them.

Mr. Justice Black expresses a desire to return to *Powell v. Alabama*, 287 U.S. 45, which, as he points out, was a capital case. This Court in *Powell v. Alabama* said, ". . . (U)nder the circumstances, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process," but it added: "(W)hether this would be so in other criminal prosecutions or under other circumstances we need not determine. All that is necessary now to decide, as we do decide, is that, in a capital case, where the de-

fendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law."

This, as we view it, is a tacit recognition of the wisdom of the present rule that the necessity for the appointment of counsel must be determined "by an appraisal of the totality of facts in a given case."

In concluding, Mr. Justice Black remarked that he would hold that defendants prosecuted for crime are entitled to counsel whether it is their life, their liberty, or their property which is at stake in a criminal prosecution. This poses the problem whether an indigent is entitled to counsel only when he is prosecuted for a felony, or should the right be extended to cover cases where misdemeanors are involved. An illegal sentence of imprisonment for three or six months is no less a deprivation of liberty without due process of law than is one for a substantial number of years.

Then, too, since the due process clause of the Fourteenth Amendment protects property as well as life and liberty, it seems illogical to confine the mandatory appointment of counsel for indigents to criminal prosecutions. Not infrequently, a man's property is nearly as dear to him as is his liberty. As observed by Mr. Justice Roberts in *Betts v. Brady*, if the Fourteenth Amendment requires that counsel be furnished in all criminal trials, logic would require the furnishing of counsel in civil cases involving property. Surely, this was not intended by those who fashioned the Fourteenth Amendment.

In his concurring opinion in *Cocalog v. Cochran*, No. 158, October Term, 1961, decided April 30, 1962 (U.S. , 82 S.Ct. , 8 L.Ed.2d 70), Mr. Justice Douglas correctly assumed that the intricate procedural rules, complex and confusing to laymen, prescribed by the criminal statutes of Florida and the other states, are not applied with the same vigor against a layman defending himself as they are against one represented by a lawyer:

Where an accused is tried without the assistance of counsel, it is a widespread practice in Alabama, and presumably in the other states as well, for those who prosecute for the State to allow the accused great latitude in the presentation of his case. Few objections are interposed with respect to the admission of documentary evidence or during the direct and cross-examination of witnesses by the accused, with the result that much incompetent, irrelevant and hearsay evidence gets to the jury. Furthermore, where, as is generally the case, the accused makes no arguments to the jury, the prosecuting attorney also refrains from making any jury arguments. Those who are familiar with criminal prosecutions know that a closing argument to the jury, reviewing the really significant evidence and emphasizing its importance, is one of the most critical stages of a trial. It is there that an astute and skilled prosecutor exerts his greatest influence on the jury.

Admittedly, this leniency is usually grounded on the ulterior realization that any other course of conduct would generate in the mind of the jury an antagonism toward the prosecutor and would intensify the already present sympathy for the accused who, being unaided by counsel, appears in the role of the underdog. Whatever the reason, it

deprives the state's attorney of a potent weapon and works to the advantage of the accused. At the last meeting of the Alabama Bar Association, when this subject was discussed with a group of the State's prosecuting attorneys, there was widespread agreement among them that an accused, tried without aid of counsel, stands a better chance of obtaining from a jury either an outright acquittal or less severe punishment than one represented by an attorney. Many observers of the criminal trial scene are of the opinion that today only a few lawyers who undertake criminal defense cases are equal matches for career prosecutors whose intimate familiarity with a wide variety of criminal charges and prosecution techniques make them very formidable adversaries.

This demonstrates that, generally speaking, indigent persons charged with crimes are not as unfortunately situated as critics of the *Betts v. Brady* rule would have us believe. It also dilutes to a great extent Mr. Justice Douglas' statement in *Gayley v. Cochran* that the rule of *Betts v. Brady*, projected in a jury trial, faces a layman with a labyrinth he can never understand nor negotiate. Many of today's defendants are recidivists who are not strangers to legal proceedings; but even he who appears in court for the first time and is unattended by counsel, though not understanding it, usually can negotiate the "labyrinth" of a criminal prosecution. The record in the instant case reflects the fact that the petitioner presented the available defense about as ably as an average lawyer could have done.

In *Gayley v. Cochran*, Mr. Justice Douglas adopted the views which he, with the concurrence of Mr. Justice Brennan, expressed in *McNeal v. Culver*, 365 U.S. 109. There he stated:

"The result of our decisions is to refuse a state the

> power to force a person into criminal trial without a lawyer if he wants one and can afford to hire one, but to deny the same protection to an accused who is too poor to retain counsel. This draws a line between rich and poor that is repugnant to due process. . ."

He pointed out that *Betts v. Brady* requires the indigent, when convicted in a trial where he has no counsel, to show that there was fundamental unfairness, and he raised the question, "Are we to wait to overrule it [i.e., *Betts v. Brady*] until a case arises where the indigent is unable to make a convincing demonstration that the absence of counsel prejudiced him?"

The people of our United States have long favored a free enterprise system under which they take care of themselves. They have sought to avoid socialism which, as we understand it, is a state of affairs in which the government takes care of the people. A graphic illustration of this occurred on July 17, 1962, when, for the second time in two years, the United States Senate, a deliberative body which is responsive to the will of the people, defeated a medical aid bill which was designed primarily for the benefit of some 17,000,000 citizens over 65 years of age who reportedly are in dire need of medical treatment and cannot get it because they cannot afford it. The same bill bogged down in the Ways and Means Committee and never reached the floor of the House of Representatives for a vote.

Because of the inherent disparity in ability among people, our free enterprise system has always produced two classes of people—those who have and those who have not. No one questions the desirability of having furnished to those who are economically underprivileged many of the things which are available only to our more prosperous citizens. Yet it cannot be argued logically that a state's failure to provide

such things is a violation of the due process clause of the Fourteenth Amendment. Why, then, single out a state's failure to furnish counsel for a poor person charged with a non-capital crime and hold that it is repugnant to due process?

Frankly, we are puzzled by the question posed by Mr. Justice Douglas in *McNeal v. Culver*. It is our opinion that the whole concept of the "fundamental unfairness" which offends the Fourteenth Amendment is based upon the ability of an individual to make a convincing demonstration that he was prejudiced by some action or inaction on the part of a state which resulted in his conviction. In the absence of injury, the violation of some naked right should present no cause for complaint. As we view it, *Betts v. Brady* imposes no greater or lesser burden upon an accused, for whom counsel was not appointed in a state prosecution for a non-capital offense, than to prove that he was injured prejudicially thereby.

IV

Footnote 24 on page 27 of petitioner's brief asserts that from seventy-five to ninety percent of all state cases are decided by pleas of guilty. Surely, it is illogical, unwarranted and unrealistic to assume that, at most, anything more than a minute number of such guilty pleas are the product of anything other than a recognition by the accused that he is guilty, coupled with a knowledge that the state has uncontrovertible proof of his guilt, and an attendant awareness that his only hope for receiving the lightest punishment possible for his crime lies in cooperating with the state to the extent of dispensing with an unnecessary trial. For such accused persons as do enter guilty pleas under these circumstances, can it be argued with reason that, if the accused

is indigent, the state must be burdened with the necessity of appointing and paying an attorney solely for the purpose of pleading his client guilty?

Many of the less affluent counties of a state may find that in non-capital prosecutions it is an unbearably onerous financial burden to pay the fees of attorneys, especially where in good conscience the lawyers can only recommend that their clients enter guilty pleas. Conceivably, this might act as a deterrent to effective law enforcement. Furthermore, it is not an uncommon situation in thinly populated rural counties for there to be more persons charged with crime than there are lawyers versed in criminal practice; and some judges may encounter real difficulty in appointing enough qualified lawyers to serve at their criminal terms of court.

Clearly, the desirability or necessity for the appointment of counsel to represent indigents being prosecuted for non-capital crimes under these and other circumstances calls for a determination, not by a court far removed from the local scene, but by state authorities who have an intimate familiarity with and an understanding of the conditions, problems and attitudes of their own people.

CONCLUSION

Even with its exposure to occasional abuses, the rule of *Betts v. Brady* remains the best one for our American way of life. Any decision to make mandatory the appointment of counsel for all indigents charged with crime in state courts should come not from this Court but from the people of the individual states acting through their elected legislatures or judges.

JOINDER ON BRIEF

The foregoing amicus curiae brief has been read, and the arguments advanced therein have been approved and adopted as their own, by Honorable T. W. Bruton, Attorney General and Honorable Ralph Moody, Assistant Attorney General, State of North Carolina.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, George D. Mentz, one of the attorneys for the amicus curiae and a member of the Bar of the Supreme Court of the United States, served copies of the foregoing Amicus Curiae Brief for the State of Alabama Presented by its Attorney General, MacDonald Gallion, on Honorable Abe Fortas, 1229-19th Street, N. W., Washington, D. C., attorney for petitioner, and on Honorable Richard W. Ervin, Attorney General, State of Florida, Capitol, Tallahassee, Florida, attorney for respondent, by mailing them, in properly addressed envelopes with air-mail postage prepaid.

in a United States mail box in Montgomery, Alabama, on the ..... day of December, 1962.

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Assistant Attorney General
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IN THE

Supreme Court of The United States

No. 155
October Term, 1962

CLARENCE EARL GIDEON,
Petitioner,

v.

H. G. COCHRAN, JR., Director
Division of Corrections,
Respondent.

On Writ of Certiorari to the Supreme Court of
The State of Florida

BRIEF FOR THE RESPONDENT

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IN THE

Supreme Court of The United States

No. 155

October Term, 1962

CLARENCE EARL GIDEON,

Petitioner,

v.

H. G. COCHRAN, JR., Director
Division of Corrections,

Respondent.

On Writ of Certiorari to the Supreme Court of
The State of Florida

STATEMENT OF THE CASE

On October 11, 1961, Clarence Earl Gideon, an inmate of the Florida State Prison at Raiford, filed a petition for writ of habeas corpus in the Supreme Court of Florida, alleging substantially as follows:

1. He was arrested on June 3, 1961, and charged with the crime of breaking and entering with intent to commit a misdemeanor, to wit, petit larceny.

2. He plead not guilty and was tried and convicted in the Circuit Court of Bay County, Florida, on August 4, 1961.

3. He was sentenced on August 25, 1961, to a term of five years in the State Prison.

4. At the time of trial he was without funds and without an attorney. He asked the trial court to appoint him an attorney but his request was denied. He told the court that the United States Supreme Court had ruled that the State of Florida should see that everyone who is tried for a felony should have legal counsel, but the court ignored this plea thereby allegedly denying him his rights under the 4th, 5th and 14th Amendments.

5. He sent a petition from the county jail of Bay County to the United States District Court at Tallahassee, Florida, but the Sheriff's office and officials refused to let it go out, contrary to the laws of the United States (R. 45-46).

The Petitioner did not recite any circumstances to show that the trial was unfair or that the charges against him were com-

plex. Nor did Petitioner allege that he was incapable of adequately making his own defense, by reason of any lack of mental capacity, education, experience, etc. On October 30, 1961, the Supreme Court of Florida denied the petition for habeas corpus without requiring a return, without a hearing, and without opinion (R. 47).

Thereafter, on January 8, 1962, Petitioner filed in this Court a petition for writ of certiorari and a motion for leave to proceed *in forma pauperis*. Respondent filed an informal *Response* to the petition.[1] On June 4, 1962, this Court entered an order granting the motion and the petition for certiorari. In addition to other questions presented by this case, counsel were requested to discuss the following in their briefs and oral argument: "Should this Court's holding in *Betts v. Brady*, 316 U.S. 455, be reconsidered?" (R. 47-48).

Petitioner's Designation For Printing, directed that the formal record and the reporter's transcript of trial proceedings in the Circuit Court of Bay County, Florida, be printed and included in the record in this cause.[2] Respondent moved to strike those paragraphs of Petitioner's designations pertaining to the trial proceedings in Bay County,[3] since the trial record and transcript were not before the Florida Supreme Court[4] and are not, there-

---

1. *Response To Petition For Writ Of Certiorari*, filed April 9, 1962.
2. *Petitioner's Designation For Printing*, paragraphs 1 and 2, p. 1.
3. *Respondent's Motion To Strike Paragraphs 1 and 2 Of Petitioner's Designation For Printing*, filed August 31, 1962.
4. Attached to *Respondent's Motion To Strike* is a certificate of the Honorable Guyte P. McCord, Clerk of the Supreme Court of Florida, to the effect that "no pleadings, transcripts, documents or papers," were before that Court, other than the

fore, incorporated in the judgment being reviewed in the present certiorari proceeding.[3] On October 15, 1962, an order was entered denying the motion of Respondent. The trial record and transcript of proceedings have been included in the printed record before this Court (R. 1-44).

---

petition for habeas corpus filed by Petitioner on October 11, 1961, and the order of the Florida Supreme Court denying said petition, filed on October 30, 1961. He also certified that "the trial record and transcript in the case of State v. Gideon in the Circuit Court of Bay County, Florida, August, 1961, have never been and are not now a part of the record which was considered by the Florida Supreme Court in denying Gideon's petition for writ of habeas corpus in October, 1961."

5. We quote, as follows, from *Respondent's Motion To Strike*, *supra* note 3 at p. 3:

> "The Florida Court did not have before it the transcript of trial proceedings and formal record in the Circuit Court of Bay County, Florida, which petitioner seeks to include in the printed record in the instant cause, and that Court denied Gideon's petition for habeas corpus on the basis that the bare allegations contained therein were insufficient as a matter of law. The trial papers are not needed by petitioner to prove the allegations of the petition, since respondent has admitted that those allegations must be taken as true. Matters which took place at the trial which were not alleged in the petition for habeas corpus are not involved in the instant case, and therefore have no place in the printed record. For these reasons, inclusion of the trial papers in the printed record herein would be unnecessary and improper."

QUESTIONS PRESENTED BY THE PETITION IN THE FLORIDA SUPREME COURT

In his petition for habeas corpus, Gideon alleged that (1) he was denied counsel and (2) the "sheriff's office and officials" of Bay County refused to send a "petition" he had drawn to the United States District Court at Tallahassee, Florida. Point (2) has not been briefed and is evidently abandoned by Petitioner in this Court. That allegation was answered by Respondent in his informal *Response* to Gideon's petition for certiorari wherein it was pointed out that, although the Fourteenth Amendment is violated if state Prison authorities prevent a prisoner from sending out appeal documents until it is too late to take an appeal (*Cochran v. Kansas*, 316 U.S. 255), there is no such violation where a prisoner is temporarily prevented from mailing out a habeas corpus petition. There is no jurisdictional limit on the time period within which a habeas corpus application must be filed, as there is in the case of an appeal. The grounds for habeas corpus which were available to Petitioner while he was incarcerated in the Bay County Jail were available to him when he filed his petition with the Supreme Court of Florida, and any grounds which were not raised in that Court, not being *res adjudicata*, are and will be available to him for as long as he is imprisoned under his present commitment. Therefore, Petitioner could not have been permanently injured or prejudiced by the alleged conduct of the Sheriff and officials of Bay County. It should also be pointed out that, even if Petitioner had been allowed to mail his petition to the United States District Court in Tallahassee, said petition could not have been considered until State remedies had been exhausted. *White v. Ragen*, 324 U.S. 760.[6]

6. See note 4 *supra* at pp. 11-13.

QUESTIONS INVOLVED IN THE INSTANT PROCEEDING

Respondent chooses to restate the questions involved in this case as follows:

I. Under the rule of *Betts v. Brady*, 316 U.S. 455, did the Supreme Court of Florida err in denying Petitioner's application for a writ of habeas corpus?

II. Should this Court's holding in *Betts v. Brady* be reconsidered?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions reprinted in Petitioner's brief,[7] this certiorari proceeding involves the Sixth Amendment, U.S. Const.; Section 79.01, Florida Statutes; and Chapter 61-639, Laws of Florida, 1961. These provisions are reprinted in the Appendix A, *infra*.

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7. Section 1 of the Fourteenth Amendment, U. S. Const.; Fla. Const., Declaration of Rights, §11; and Sections 810.05 and 909.21, Florida Statutes. See *Brief For The Petitioner*, pp. 6, 48, and 49.

SUMMARY OF ARGUMENT

Betts v. Brady should not be overruled or modified.

I.

The allegations of Gideon's petition for habeas corpus in the Florida Supreme Court were insufficient, under existing case law developed by this Court, to entitle him to discharge from custody. Under these circumstances, the denial of the petition by the Florida Court, without requiring a return, was proper.

A charge of breaking and entering with intent to commit petit larceny is uncomplicated, and the allegation, standing alone, that Petitioner was required to defend himself on that charge is insufficient to entitle him to habeas corpus relief, under the doctrine of *Betts v. Brady*.

The trial transcript and record of proceedings in Bay County, Florida, are not incorporated in the judgment of the Florida Supreme Court and are not, therefore, subject to review in the present proceedings. However, even if we consider matters which were not before the Florida Supreme Court, such as the trial proceedings and Petitioner's personal history, it is apparent that Petitioner was competent to handle his own defense and that he received a fair trial.

II.

Historically, there is no basis for requiring the states to automatically appoint counsel in all cases. The English common law did not even provide a right to retain counsel, except in

misdemeanor and minor cases. The right to counsel provision of the Sixth Amendment, as of the time of its adoption, was intended to do way with the rules which denied representation, and was not aimed to compel the states to provide counsel for a defendant. The construction given the Sixth Amendment by this Court in *Johnson v. Zerbst*, 304 U.S. 458, was the outgrowth of a practice which had become common in the federal court system and constituted, to some extent, an exercise by this Court of its supervisory and rule-making powers over the inferior federal courts. That decision did not contemplate that automatic appointment of counsel would be required as a requisite of due process. In *Powell v. Alabama*, 287 U.S. 45, appointment of counsel was absorbed into the concept of due process to the extent that such appointment is essential to the substance of a hearing, and to that extent only.

In accordance with the requirements of our federal system of government, the states should not be required by constitutional mandate to provide counsel for indigent defendants in every case. Under the Tenth Amendment, powers not granted to the central government were reserved to the states, and those powers cannot be decreased or modified. A requirement that counsel be automatically appointed would infringe upon the historic right of the people of the states to determine their own rules of procedure and would defeat the very desirable possibility of experiment.

The "fair trial" rule as enunciated in *Powell v. Alabama* and *Betts v. Brady*, is the only test consistent with the nature and meaning of due process, since that provision is not susceptible to being reduced to a mechanical or fixed formula, and must

necessarily depend upon the circumstances of each particular situation. The right to counsel is just one aspect of the comprehending guaranty of the due process clause of a fair hearing. The Sixth Amendment, as construed in *Johnson v. Zerbst*, can be made applicable against the states through the Fourteenth Amendment only so far as the substance of a hearing would be thwarted by failure to provide counsel.

The case by case approach under the *Betts* rule is the only approach consistent with the demands of federalism and the meaning of due process. That rule provides a clear and consistent standard for determination of the right to counsel under the Fourteenth Amendment.

Although many states now provide for automatic appointment of counsel in some cases, the right so provided has not generally been accepted as a fundamental requirement. Constitutions, cases, statutes, and court rules on the subject in the states are inconsistent, and few states have construed automatic appointment provisions in cases less than capital as having constitutional or fundamental character.

To "absorb" the Sixth Amendment, as construed in *Johnson v. Zerbst*, into the due process clause of the Fourteenth Amendment, would be to impose upon the states a requirement to provide free counsel to defendants in all criminal cases, including misdemeanors. Also, since the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, the rule urged by Petitioner would require the furnishing of counsel in civil cases, in federal as well as state courts.

An automatic requirement that counsel be appointed in every case would not decrease the quantity of habeas corpus petitions being filed in federal courts. The trend in habeas corpus petitions is to allege lack of *adequate* representation, and this problem will not be solved by imposition of a rule requiring automatic appointment. A decision overruling *Betts* would engender much new litigation.

A state may not deny access to its courts on account of poverty, but should not be required to equalize social and economic conditions among its citizens. If this Court should require automatic appointment of counsel under the equal protection clause of the Fourteenth Amendment, states would logically be required to provide counsel in appeals and post conviction proceedings, and would be required to equalize economic conditions in a number of ways. This would bring on a host of problems not contemplated under the Fourteenth Amendment.

A decision reversing the present case, if retroactive, will allow over 5,000 hardened criminals in Florida to be set free. Retrials of these prisoners will be impossible in many cases. Florida and other states have followed the *Betts* rule in good faith, and to overrule that decision and impose a retroactive rule requiring appointment of counsel in all cases would endanger society.

ARGUMENT

I. THE SUPREME COURT OF FLORIDA DID NOT ERR IN DENYING GIDEON'S PETITION FOR HABEAS CORPUS.

A. Petitioner Failed To Allege Any Circumstances Which Would Entitle Him To Habeas Corpus Relief On The Ground That His Right To Counsel Was Denied.

In the case of *Powell v. Alabama*, 287 U.S. 45, this Court held that in a capital case, where the defendant is unable to employ counsel, and is incapable of adequately making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the Court whether requested or not, to assign counsel for him as a necessary requisite of due process of law.

In *Betts v. Brady*, 316 U.S. 455, this Court indicated that although a denial by a state of rights or privileges specifically embodied in the Sixth Amendment to the United States Constitution may, in certain circumstances, or in connection with other elements, operate in a given case to deprive a defendant of due process of law in violation of the Fourteenth Amendment, it cannot be said that the due process clause of the Fourteenth Amendment incorporated, as such, the specific guarantees found in the Sixth Amendment. As pointed out in that decision, due process of the Fourteenth Amendment formulates a concept less rigid and more fluid than those envisaged in other specific and particular privileges of the Bill of Rights. We quote from the decision:

"Its (The Fourteenth Amendment's) application is less a matter of rule. Asserted denial is to be tested by an ap-

praisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed."[8] (Parentheses added)

In the *Betts* case, the crime was robbery and the accused was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests in that particular instance, since the issue was simply the veracity of the testimony for the State and that for the defendant. The accused was not wholly unfamiliar with criminal procedure. Under such circumstances it could not be said that his trial without a jury, resulting in a sentence of eight years, was lacking in the common and fundamental ideas of fairness and right embodied in the due process clause of the Fourteenth Amendment. The interpretation of the Fourteenth Amendment as enunciated by this Court in the *Betts* case was applied to a case involving a jury trial, in *Gallegos v. Nebraska*, 324 U.S. 55.

According to the opinion in *Bute v. Illinois*, 332 U.S. 134, an accused has a right to the assistance of counsel for his defense when there are special circumstances showing that, otherwise, the defense would not enjoy that fair notice and adequate hearing which constitute the foundation of due process of law in the trial of any criminal charge. Any doubts as to the regularity of the trial proceedings should be resolved in favor of the integrity, competence and proper performance of their

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8. 316 U.S. at 462.

official duties by the judge and the prosecutor, and if any presumption is to be indulged it should be one of regularity rather than that of irregularity. Since Bute had made no affirmative showing of exceptional circumstances such as would amount to a violation of due process under the Fourteenth Amendment, his convictions were affirmed.

In *Quicksall v. Michigan*, 339 U.S. 660, it was pointed out that, "to invalidate a plea of guilty the prisoner must establish that 'for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement . . .'"[9]

Carter v. Illinois, 329 U.S. 173, involved a thirty year old Negro convicted of murder and sentenced to imprisonment for ninety-nine years. The trial judge did assign counsel when it came to sentencing, and petitioner alleged, on petition for certiorari, that this showed he was incapable of defending himself and entering his plea of guilty. This Court's opinion indicated that designation of counsel to assist the accused at the sentencing stage of the trial in no wise implied that the defendant was incapable of pleading guilty. The conviction was affirmed, primarily because there was nothing in the record showing what manner of man the defendant was. "Facts bearing on his maturity or capacity of comprehension, or on the circumstances under which a plea of guilty was tendered and accepted, are wholly wanting. . . ."[10] There was no showing by petitioner of circumstances creating unfairness such as would entitle him to appointment of counsel.

9. 339 U.S. at 666. The opinion cited *Foster v. Illinois*, 332 U.S. 134, and *Gibbs v. Burke*, 337 U.S. 773, as authority for this statement.

10. 329 U.S. at 178.

In *Gryger v. Burke*, 334 U.S. 728, the petitioner complained of a life sentence imposed under a Pennsylvania habitual criminal act when he was thirty-four years old. He failed to show any exceptional circumstances requiring appointment of counsel, and for that reason his conviction was upheld.

In his petition to the Florida Supreme Court, Gideon made no affirmative showing of any circumstances or unfairness which would have entitled him to counsel under the Fourteenth Amendment. He merely alleged that he was without funds and that he pleaded not guilty and requested court appointed counsel while being tried on a charge of breaking and entering with intent to commit a misdemeanor. Petitioner made no allegations concerning his age, experience, mental capacity, familiarity or unfamiliarity with court procedure, or the complexity of the legal issues presented by the charge, he made no showing of unfairness or of a lack of fundamental justice in the trial proceedings. His petition lacked any material allegations which would entitle him to counsel under the Fourteenth Amendment, and the Florida Supreme Court, in denying the petition without requiring a hearing or return, properly applied existing rules of law which have been developed by this Court.

B. Petitioner Was Not Entitled To Habeas Corpus Relief On The Mere Allegation That He was Refused Court-Appointed Counsel At Trial For Breaking And Entering With Intent To Commit Petit Larceny.

A charge of breaking and entering with intent to commit petit larceny in Florida is uncomplicated, and Petitioner's mere allegation, standing alone, that he was refused counsel by the trial court and thereby required to defend himself on that

charge, did not entitle him to habeas corpus relief in the Florida Supreme Court.

Foster v. Illinois, 332 U.S. 134, involved two petitioners who had been thirty-four and forty-eight years of age at the time they had entered pleas of guilty to charges of burglary and larceny. The convictions were affirmed because there was "neither proof nor uncontradicted allegation of any . . . miscarriage of justice in accepting pleas of guilty . . ." Although in that case the petitioners had pleaded guilty, Mr. Justice Frankfurter, speaking for the Court, pointed out that where exceptional circumstances exist which would require that a defendant be appointed counsel under the rule set forth in *Betts v. Brady*, *supra*, and *Palko v. Connecticut*, 302 U.S. 319, 327, the need for such appointment "may exist whether an accused contests a charge against him or pleads guilty."[11] Inherent in the Court's holding in *Foster v. Illinois* is the principle that a charge of burglary or larceny, in and of itself, is not so complex as to require appointment of counsel as an essential of Due Process, and this principle is applicable regardless whether the defendant pleads guilty or contests the charge.

In Florida, to constitute the crime of breaking and entering or entering without breaking, with intent to commit a misdemeanor, the accused must have intended to commit that misdemeanor in the building. *McNair v. State*, 61 Fla. 35, 55 So. 401. The building must, of course, belong to someone else. *Cannon v. State*, 102 Fla. 928, 136 So. 695; *Vicente v. State*, 66 Fla. 197, 63 So. 423. The gist of the offense is the intent entertained by the wrongdoer at the time of the breaking or entering. *Vawter v. State*, 63 So. 2d 255. The offense with

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11 332 U.S. at 138.

12 *Id.* at 137. See also *Uveges v. Pennsylvania*, 335 U.S. 437, 441.

which Petitioner was charged consists of three simple elements: (1) a breaking or entering (2) the building of another (3) with intent to commit petit larceny.[13]

C. The Trial Record And Transcript Are Not Incorporated In The Judgment Of The Florida Supreme Court And Therefore Are Not Subject To Review By This Court.

Section 79.01, Florida Statutes,[14] requires that, before a writ of habeas corpus shall issue, the petitioner shall show "probable cause to believe that he is detained in custody without lawful authority." The writ of habeas corpus does not issue as of course in every instance. Reasonable grounds or justiciable issues must be shown to exist before the writ will be awarded, and, where a petition does not make a prima facie showing that the applicant is entitled to be discharged from custody, the writ should be denied when applied for in the first instance. *Skipper v. Schumacher*, 118 Fla. 867, 160 So. 357; *ex parte Aulday*, 113 Fla. 70, 151 So. 388; *Sullivan v. State ex rel McCrory*, 49 So. 2d 794; *State ex rel Davis v. Hardie*, 108 Fla. 133, 437, 146 So. 97.[15] For purposes of determining whether the petitioner has made such prima facie showing, the allegations of the petition must, of course, be accepted as true. *Cash v. Culver*, 358 U.S. 633.[16] The practice of the Florida Supreme

13. In Florida the crime of petit larceny is the stealing of property having a value of less than $100.00. Section 811.021, Florida Statutes.
14. See Appendix, *infra*.
15. See also *Sneed v. Mayo*, 60 So. 2d 865, 69 So. 2d 653.
16. In the *Cash* case, it was pointed out that allegations of circumstance which would entitle petitioner to relief, if true, made it incumbent upon the Florida courts, in that instance, to determine what the true facts were. After reversal by this Court, the Florida Supreme Court determined that Cash's

Court is to deny the petition if its allegations are insufficient but to issue a writ and require a return if a prima facie showing is made that petitioner is being illegally held. If, after return, there is a dispute of fact, that Court will order a hearing before a commissioner. In the instant case the bare allegations of petitioner, without any showing of circumstances which operated to deny him a fair hearing, were insufficient to entitle him to issuance of a writ of habeas corpus[17] and the order of denial issued by the Florida Supreme Court was proper.

Under 28 U.S.C. §1257, upon which jurisdiction is invoked in the present case, this Court may, by certiorari, review certain *judgments or decrees* rendered by the highest court of a state. A judgment is a decision of a court based upon matters which are before it for determination. As already pointed out, the Florida Supreme Court was under no duty, under existing law, to issue a writ and require a return or a hearing in the present case. In the absence of such duty or obligation, it is apparent that matters which were not alleged or incorporated in the petition are not and cannot be considered to be included in the judgment now being reviewed. In *Hedgebeth v. North Carolina*, 334 U.S. 806, 807, in a *per curiam* opinion this Court noted that "In reviewing a judgment of a State court, we are bound by the record on which that judgment was based." From *Carter v. Illinois*, *supra*, page 176, we quote as follows:

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representations as to need for court-appointed counsel were unfounded but that he had been deprived of a reasonable opportunity to obtain counsel of his own choice. *Cash v. Culver*, 120 So. 2d 590; 122 So. 2d 179.

17. *Betts v. Brady*, *Carter v. Illinois*, *Gryger v. Burke*, *Quicksall v. Michigan*, *Bute v. Illinois*, *supra*.

"When a defendant, as here, invokes a remedy provided by the State of Illinois, the decision of the local court must be judged on the basis of the scope of the remedy provided and what the court properly had before it in such a proceeding . . . ."

It is Respondent's position that, although the Bay County trial court record and transcript of proceedings have been incorporated in the printed record before this Court, they do not form a part of the judgment subject to review and should not constitute a predicate for this Court's decision herein.

D. The Trial Record And Proceedings And Petitioner's Personal History Show That He Received A Fair Trial.

Even if we assume that this Court has the power, on this review, to supplement the judgment of the Court below with transcripts and other matters which were not before the Florida Supreme Court, it is obvious from an examination of the trial record and proceedings and the personal history of Petitioner that he received a fair trial in the Circuit Court of Bay County, Florida. Although the trial proceedings[18] do not contain information bearing on Petitioner's age, education, work experience, etc., it should be pointed out that Petitioner is a white male and that he was fifty years old at the time of the crime herein involved. His prison record reflects that he completed the eighth grade. He lists his occupation as being that of a mechanic, but his prison classification summary also shows that he has worked as a short order cook and an auto electrician and that he worked at a shoe factory while previously in prison.

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18. R. 1-44.

Petitioner's record indicates that [illegible] unfamiliar with criminal procedure.[19]

The identity of the man who was seen in the Bay Haven Poolroom appears to have been the only issue involved in the trial below. Petitioner attempted to show that the eye witness for the State, Henry Cook (R. 19-24), may have been mistaken in his identification of Petitioner as the man he saw by the cigarette machine in the Poolroom, from which money had been taken (R. 13, 20, 30, 39). It was his theory that Cook had seen someone else in the Poolroom and had then mistakenly thought that Petitioner, who claimed to have been in a phone booth at the time, was the man who had come out the back door of the Poolroom after the crime. This possibility, however, was effectively negated by the testimony of Henry Cook and Mrs. Rhodes (R. 17, 18, 30, 31).

The trial transcript shows that the trial judge conducted a fair and impartial trial. For example, the court interrogated the venire (R. 10), explained his rights to Petitioner at various stages of the trial (R. 3, 10, 11, 41), and charged the jury with a complete and fair set of instructions (R. 42-44).

Petitioner took an active role in his defense and showed that he possessed much skill and facility in questioning witnesses and handling himself in court. He made an opening statement (R. 11), examined ten witnesses, and made an eleven-minute closing argument to the jury (R. 41).

Counsel for Petitioner has attempted to show that Gideon

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19 *Betts v. Brady*, *supra*, at 472.

did not receive a fair trial. He cites *McNair v. State*, 61 Fla. 35, 55 So. 401, as authority for the notion that "the offense of breaking and entering with intent to commit a misdemeanor raises a number of subtle and complex questions."[20] That case states that intent is the gist of the offense and that it is not necessarily implied from the simple fact of entering a building. The case also points out that whether the defendant had the necessary intent is a question of fact to be decided from all the circumstances of the case. In the instant case, breaking was proven to the satisfaction of the jury as was the theft of money and wine by Petitioner. Proof of these facts is strong evidence that Petitioner possessed the requisite intent when he broke into the Bay Harbor Poolroom.

Petitioner complains that the trial judge did not explain the elements of the offense to the jury.[21] We would like to point out that the trial court defined the crime charged with as much particularity as can be required considering the simplicity of the crime of breaking and entering with intent to commit petit larceny.

Petitioner intimates that he may have had a good defense (intoxication) which he was unable to present due to lack of counsel, and that the Court failed to instruct the jury with regard to such defense.[22] He cites *Jenkins v. State*, 58 Fla. 62, 50 So. 582, to illustrate his position. That case holds that a verdict of guilty for breaking and entering with intent to commit petit larceny will not be set aside upon the ground of

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20. *Briefs For The Petitioner*, p. 49.
21. *Ibid.*
22. *Id.* at 49, 50.

intoxication where the evidence fails to show that the defendant was intoxicated at the time that he entered the building to such an extent that he was unable to form a criminal intent. In *Miller v. State*, 76 Fla. 518, 80 So. 314, no evidence was adduced to show that the defendants were not in the full possession of their faculties at the time of the commission of the crime. The Florida Supreme Court indicated that in the absence of such evidence an instruction as to intoxication was properly refused. In the present case, the evidence showed that Petitioner was not intoxicated during the commission of the crime (R. 26, 27, 40). *Adkinson v. State*, 48 Fla. 1, 37 So. 522, cited by Petitioner,[23] to show that the trial judge improperly limited cross examination must be limited to the facts of that case.

Counsel for Petitioner makes capital of the fact that Petitioner was given a sentence of five years, the maximum prison term authorized for the crime for which he was convicted,[24] even though he committed a relatively minor offense. In all fairness to the trial judge, it must be noted that at the time of sentencing, Petitioner had already been convicted of four felonies, three of which involved burglary in some form. This factor undoubtedly had some bearing on the sentence given Petitioner in the present case.

When Petitioner first appeared for arraignment he "requested permission to consult counsel" and arraignment was postponed for one month (R. 2). At his arraignment he was "questioned by the Court concerning his understanding of the charge filed against him and of his rights under the law" (R.3). Although no

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23. *Id.* at 50.
24. *Id* at 3, 50.

transcript of these pre-trial proceedings is available, it appears that Petitioner may not have been indigent at that time, that he may have consulted counsel prior to trial and that he may have waived his right to counsel prior to the day of trial.

From the trial record and transcript, as supplemented by Petitioner's personal history, it is obvious that he was competent and that he received a fair trial.

II. THIS COURT'S HOLDING IN *BETTS V. BRADY* SHOULD NOT BE OVERRULED OR MODIFIED.

A. Historically, There Is No Basis For Requiring States To Automatically Appoint Counsel In All Cases.

At common law in England a prisoner was not entitled to defend by counsel upon the general issue of not guilty on any indictment for treason or felony,[25] but in misdemeanor cases English law had recognized the accused's right to retain counsel.[26] In some instances, persons charged with felony were allowed counsel with respect to legal questions which the accused himself might suggest,[27] but it was not until 1836 that the right to retain counsel, in England, was extended to all criminal proceedings.[28]

The Constitutions of the thirteen original states as of the time the Bill of Rights was ratified, in 1791, reflect that Maryland, Massachusetts, New York, Pennsylvania, New Hampshire,

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25. *Betts v. Brady*, *supra*, at 466.
26. Beaney, *The Right to Counsel in American Courts*, p. 8 (1955).
27. *Powell v. Alabama*, *supra*, at 60.
28. See note 26 *supra*.

Delaware and New Jersey had constitutional provisions providing for the right to counsel in one form or another. The Massachusetts provision was adopted in 1790, after Congress had approved the Bill of Rights in 1789 but before those amendments had been fully ratified by the states.[29] The statutes in force in the thirteen original states in 1789-91 exhibit great diversity of policy. Pennsylvania, South Carolina and Delaware provided for appointment of counsel in capital cases prior to 1789, and New Hampshire passed such a law in February, 1791, prior to complete ratification of the Sixth Amendment. An act passed by Massachusetts in 1777 gave the right to have counsel appointed in cases of treason or misprision of treason. Connecticut had no statute on the subject but it may have been the custom of the courts in that State to assign counsel in all criminal cases. North Carolina made no provision for appointment but accorded defendants the right to have counsel.[30]

According to the above information regarding the laws and practices of the courts of the thirteen original states at the time that the Bill of Rights became part of the Constitution, it appears that the courts of only one state made any provision for assignment of counsel in cases less than capital; and the courts of that state did so only by custom and practice and not by statutory or constitutional mandate. In view of these facts, it must be concluded that the right to counsel provision of the Sixth Amendment did not, at the time of its adoption and ratification, embrace the right to have counsel appointed. It only included the right to retain counsel. In light of the common law practice, it has been said that the right to counsel

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29. See note 25 *supra* at 465.
30. *Id.* at 467, fn. 20; See note 27 *supra* at 62, fn. 1.

provision of the Sixth Amendment was intended to do away with the rules which denied representation but was not aimed to compel the state to provide counsel for a defendant.[31]

The above conclusion is substantiated by Story, who commented on the right to counsel as being a right to *employ* counsel.[32] Several months before the ratification of the Bill of Rights, Congress furnished an illuminating clue concerning the original meaning of the counsel provision of the Sixth Amendment when it passed a law requiring that every person indicted for treason or other capital crime in the federal courts shall be entitled to assignment of counsel.[33] If the proposed Sixth Amendment counsel provision included a guaranty of appointed counsel in all cases, Congress obviously would not have passed this halfway measure.[34]

In the case of *United States v. Van Duzee*, 140 U.S. 169, decided in 1890, this Court stated that:

"There is . . . no general obligation on the part of the government either to furnish copies of indictments, summon

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31. See note 25 *supra*.
32. *Story on the Constitution*, 5th Ed., §1794, p. 574.
33. 1 United States Statutes at Large, ch. 9, p. 118 (1790). That statute, in pertinent part, reads as follows:
"... every person so accused and indicted for any of the crimes aforesaid, (treason, other capital offenses) shall also be allowed and admitted to make his full defense by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required immediately upon his request to assign to such person such counsel, not exceeding two as such person shall desire, ..." (parentheses added).
34. See note 26 *supra* at 28.

witnesses or retain counsel for defendants or prisoners. The object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to them, but it was not contemplated that this should be done at the expense of the government . . . ."

All courts have the inherent power to appoint counsel where that course seems to be required in the interest of fairness, and, though the Sixth Amendment did not originally require assignment of counsel to defend indigent defendants, it nevertheless became an almost universal practice, between 1789 and 1938, for the federal courts to assign counsel to unrepresented indigent defendants in all serious criminal cases.

In 1931, the Wickersham Commission, in outlining the essential characteristics of American criminal proceedings, concluded that the right guaranteed by the Sixth Amendment and similar state provisions was, historically, that of employing counsel.[35]

In *Johnson v. Zerbst*, 304 U.S. 458, this Court construed the Sixth Amendment as requiring automatic appointment of counsel in all federal criminal cases. The decision was an outgrowth of the practice which had developed in the federal court system. It is apparent, from the opinion of this Court in *Johnson v. Zerbst* and from the circumstances under which it was rendered, that the holding of that case was not predicated on history nor was it based on the premise that automatic appointment in all criminal cases is a requisite of due process of law under the Fifth or Fourteenth Amendments. The construction given the

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35. *U.S. National Committee On Law Observance and Enforcement, Report on Prosecution*, p. 30 (1931).

Sixth Amendment counsel provision in *Johnson v. Zerbst* constituted, to some extent, an exercise by this Court of its supervisory and rule-making power over federal criminal procedure. For discussions concerning this supervisory power, see *McNabb v. United States*, 318 U.S. 332, 340; *United States v. Rabinowitz*, 339 U.S. 56, 57, (Justice Black, dissenting); *Holland v. United States*, 348 U.S. 121, 135 (footnote 7); *Hoag v. New Jersey*, 356 U.S. 464, 471; *Marshall v. United States*, 360 U.S. 310, 313; *Rosenberg v. United States*, 346 U.S. 271, 287; *Gallegos v. Nebraska*, supra, at 64; *Watts v. Indiana*, 338 U.S. 49, 50, footnote 1); and *Mookini v. United States*, 303 U.S. 201, 206. This rule-making or supervisory power does not exist with respect to criminal procedure in state courts. We quote from the *McNabb* case, *supra*:

> "... while the power of this Court to undo convictions in state courts is limited to the enforcement of those 'fundamental principles of liberty and justice,' which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction."

The radical change brought about by the *Johnson v. Zerbst*

opinion with respect to the common understanding of the meaning of the Sixth Amendment is illustrated by Judge Sibley's opinions in *Saylor v. Sanford*, 99 F. 2d 605, and *Sanford v. Robbins*, 115 F. 2d 435, written shortly after the *Johnson* decision. We quote from *Saylor v. Sanford*, supra, at page 607:

> "... The Constitution in saying that 'the accused shall enjoy the right *** to have the Assistance of counsel for his defense' means that if he provides himself counsel the court shall allow the counsel to assist and represent the accused—a right not accorded the accused in felony cases by the common law. It has never been understood that the federal courts were bound by the Constitution to furnish accused persons with counsel....
>
> There are proposals pending before the Congress to provide for a public defender, and for paying lawyers to defend indigent persons in some cases. All these arrangements for the defense of poor persons are acts of mercy, perhaps justice, but they are not required by the constitutional provisions and have never been supposed to be:..."

Sanford v. Robbins holds that the due process clause of the Fifth Amendment does not require federal courts to furnish counsel. In *Gall v. Brady*, 39 F. Supp. 504, the Court said that *Johnson v. Zerbst* had placed a construction on the Sixth Amendment which was broader than that theretofore commonly understood in the light of the history of Anglo-Saxon criminal procedure.

The test of what is due process depends, to some extent, upon the meaning and content of that term at common law and in the colonies or states prior to the adoption of the Bill of Rights. The right to be heard by counsel employed by the

defendant may well be included in that guaranty, but by any historical test that might be applied, automatic appointment of counsel in all criminal cases has never been considered an essential of due process.

In *Powell v. Alabama*, *supra*, this Court held that counsel must be appointed under the due process clause of the Fourteenth Amendment in capital cases where the defendant is ignorant, illiterate, or otherwise unable to present his own defense. The Court pointed out that the right to have counsel appointed, "when necessary" is a "logical corollary from the constitutional right to be heard by counsel."[36] The decision turned upon the fact that in the particular situation before the court, the benefit of counsel was essential to the substance of a hearing. To the extent that appointment of counsel is necessary to the substance of a hearing, and to that extent only, that "corollary from the constitutional right to be heard by counsel" has been included in the concept of due process under the Fourteenth Amendment and made applicable as against the states.

The following conclusions can be drawn from the above discussion:

1. The English common law provided the right to *retain* counsel in misdemeanors but no right to counsel in felony cases.

2. The Sixth Amendment as originally intended guaranteed the right to retain counsel, not the right to have counsel appointed in cases of indigency.

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36. 287 U.S. at 72.

3. The construction given the Sixth Amendment by this Court in *Johnson v. Zerbst* was the outgrowth of a practice which had become common in the federal court system.

4. The decision in *Johnson v. Zerbst* to some extent constituted an exercise by this Court of its supervisory and rule-making powers over the inferior federal courts.

5. This court's opinion in *Johnson v. Zerbst* did not contemplate that automatic appointment of counsel could be required as a requisite of due process of law.

6. Appointment of counsel has been included in the concept of due process to the extent that such appointment is essential to the substance of a hearing, and to that extent only.

B. Under Our Federal System, the States Should Not Be Required By Constitutional Mandate To Provide Counsel For Indigent Defendants In Every Case.

Shortly after the adoption of the Fourteenth Amendment, it was argued in the *Slaughterhouse Cases*, 16 Wall 36; 21 L. ed 394, that the privileges or immunities of the citizens of the United States which were not to be abridged by any state were the privileges which citizens theretofore had enjoyed under the Constitution. However, "after the fullest consideration that view was rejected," and the rejection has the authority that comes from contemporaneous knowledge of the purpose of the Fourteenth Amendment."[37] The majority opinion of Mr. Justice Miller in the *Slaughterhouse Cases* was reaffirmed in *Twining*

37. See concurring opinion of Mr. Justice Frankfurter in *Louisiana v. Resweber*, 329 U.S. 459, 467.

v. New Jersey, 211 U.S. 78, in which this Court held that the exemption from compulsory self-incrimination is not a privilege or immunity of national citizenship guaranteed by the Fourteenth Amendment against abridgment by the states. (See also *Adamson v. California*, 332 U.S. 46). In *Palko v. Connecticut*, *supra*, it was held that immunity from secondary jeopardy is not a privilege or immunity of the citizens of the United States.

From time to time it has been asserted before this Court that the first eight amendments of the Constitution should be "incorporated," so to speak, in the Fourteenth Amendment as limitations upon the power of the states, even though the Bill of Rights was originally intended as a restriction upon the power of the federal government. It has been consistently held, however, that the criminal procedure provisions of the first eight amendments apply only to the procedure and trial of cases in federal courts. *Gaines v. Washington*, 227 U.S. 81; *Spies v. Illinois*, 123 U.S. 131; *Re Sawyer*, 124 U.S. 200; *Brooks v. Missouri*, 124 U.S. 394; *Eilenbecker v. District Court*, 134 U.S. 31; *West v. Louisiana*, 194 U.S. 258; *Howard v. Kentucky*, 200 U.S. 164. The Fourteenth Amendment does not constitute a "shorthand summary" of the Bill of Rights;[38] and the specific procedural guarantees of the first eight amendments are not included in the meaning of due process. A prosecution for a capital case by information instead of indictment is not necessarily a violation of due process. *Hurtado v. California*, 110 U.S. 516; *Gaines v. Washington*, *supra*; *Hodgson v. Vermont*,

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38. See concurring opinion of Mr. Justice Frankfurter in *Adamson v. California*, *supra*, at 59, and dissenting opinion of Mr. Justice Stone in *Colgate v. Harvey*, 296 U.S. 404, 445.

168 U.S. 262; *Powell v. United States*, 221 U.S. 325, *Bohm v. Nebraska*, 176 U.S. 83, *McNulty v. California*, 149 U.S. 645; *Maxwell v. Dow*, 176 U.S. 581. The provision of the Bill of Rights which secures to every party, where the value in controversy exceeds $20, the right of trial by jury, does not apply to trials in the state courts. *Edwards v. Elliott*, 21 Wall 532; 22 L. ed 487. There is nothing in the Fourteenth Amendment that requires a jury trial for any offender. *Tumey v. Ohio*, 273 U.S. 510; *Maxwell v. Dow*, *supra*; *Hallinger v. Davis*, 146 U.S. 314; *Walker v. Sauvinet*, 92 U.S. 90; *Brown v. New Jersey*, 175 U.S. 172. The Federal Constitution does not require, under all circumstances, that the defendant in a state court should be confronted with witnesses against him. *West v. Louisiana*, *supra*. The Fifth Amendment privilege against self-incrimination is not applicable to the states. *Twining v. New Jersey*, *supra*; *Adamson v. California*, *supra*; *Palko v. Connecticut*, *supra*; *Cohen v. Hurley*, 366 U.S. 117.

The Fourteenth Amendment does not impose upon the states any uniform code of criminal procedure. The power of a legislature of a state to prescribe the number of peremptory challenges in criminal cases is limited only by the necessity of having an impartial jury. *Hayes v. Missouri*, 120 U.S. 68. A state is free to provide for differences in treatment of habitual criminals. *Graham v. West Virginia*, 224 U.S. 616. A state is free to allocate functions as between judge and jury as it sees fit. *Stein v. New York*, 346 U.S. 156, 179. So far as the Fourteenth Amendment is concerned, the presence of a defendant at a trial is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only. *Snyder v. Massachusetts*, 291 U.S. 97.

In *Missouri v. Lewis*, 101 U.S. 22, Mr. Justice Bradley said, in effect, that the Fourteenth Amendment would not prevent a state from adopting or continuing the Civil Law instead of the common law. He pointed out that the Fourteenth Amendment does not secure to all persons in the United States the benefit of the same laws. Each state may prescribe its own mode of judicial proceedings, and "great diversities . . . may exist in two states separated only by an imaginary line." A state may even provide for different systems of judicature in the various geographical areas within its borders.

In *Twining v. New Jersey*, *supra*, at 106, the Court commented that in our dual form of government nothing is more fundamental than the power of the state to order its own affairs and govern its own people except so far as the Federal Constitution, expressly or by fair implication, has withdrawn that power.

This Court declared, in *Maxwell v. Dow*, 176 U.S. 581, 593, that the Fourteenth Amendment did not radically change the whole theory of the relations of the State and Federal governments to each other. At page 605 of the opinion this statement was made:

> "... the people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their Constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal government that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials . . . ."

Mr. Justice Cardozo, in *Snyder v. Massachusetts*, supra, at 122, said:

> "The Constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice. . . ."

See also *Cassell v. Texas*, 339 U.S. 282; *Carter v. Illinois*, *supra*; *Buchalter v. New York*, 319 U.S. 427; *Tumey v. Ohio*, *supra*; *Jordan v. Massachusetts*, 225 U.S. 167; *Holmes v. Conway*, 241 U.S. 625; *Hoag v. New Jersey*, *supra* at 468; *Cicenia v. La Gay*, 357 U.S. 504; *Knapp v. Schweitzer*, 357 U.S. 371, 375, 376.

The states are not tied down by any provisions of the Federal Constitution to the practice and procedure which existed at common law, and they may take advantage of experience to make such changes as may be necessary. *Brown v. New Jersey*, *supra*.

Mr. Justice Frankfurter has noted that "the Fourteenth Amendment did not mean to imprison the states into the limited experience of the eighteenth century,"[39] and Justice Holmes said, in his dissent in *Truax v. Corrigan*, 257 U.S. 312, 344:

> "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion

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39. See note 37 supra at 468.

> of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."

In a right to counsel case it has been said that "due process, 'itself a historical product' . . . is not to be turned into a destructive dogma in the administration of systems of criminal justice under which the states have lived not only before the Fourteenth Amendment but for the eighty years since its adoption." *Foster v. Illinois*, *supra* at 139. From *Bute v. Illinois*, *supra* at 668, we quote as follows:

> "If in the face of these widely varying state procedures, this Court were to select the rule contended for by the petitioner (rule requiring automatic appointment of counsel in all felony cases) and hold invalid all procedure not reaching that standard, it not only would disregard the basic and historic power of the states to prescribe their own local court procedures . . . but it would introduce extraordinary confusion and uncertainty into local criminal procedure . . . ." (parenthesis added).

Under the Tenth Amendment of the Constitution, all powers not granted to the central government were specifically reserved to the states. These reserved powers, including the power of the states to control proceedings in their own courts, cannot be diminished or modified. While this Court has the power and authority to supervise the administration of criminal justice in the federal courts, it has no such power with respect to state court proceedings, except where a state has denied an individual the essentials of justice under the Fourteenth Amendment.

Where a defendant receives an unfair trial in a state court and the unfairness is not remedied by the state, it is proper that this court should have jurisdiction to reverse so that he might be accorded the fundamentals of justice. However, where a defendant is fairly tried by state courts, it is not proper, under our federal system, for the federal government or its courts to intervene.

Even if we assume, *arguendo*, that failure of a court to appoint counsel in a non-capital case under present procedural rules, is, *per se*, a denial of fundamental justice, it must be conceded that there is always the possibility that model rules of criminal procedure can be devised which would afford fair trials even to those who are unable to procure the assistance of counsel. For instance, a state may simplify its court procedure to such extent as to equalize any differences in the respective abilities of the prosecutor and the average defendant, or it may even find a way to dispense with the need for prosecuting attorneys in some cases. Rules might be devised which would make it impossible for a defendant, represented or unrepresented, to waive any defenses which he might have.

But, if this Court reverses the *Betts* case and declares an inflexible rule requiring automatic appointment in every case, states would be prevented from adopting novel forms of procedure, whether *fair or unfair*. By adopting a rule which would preclude a state from adopting a fair, just code of procedure, this Court would be infringing upon the historic powers of the states. Such a decision would defeat the very desirable possibility of state experiment in the field of criminal procedure.

C. The "Fair Trial" Test As Enunciated In *Powell v. Ala-*

bama, and *Betts v. Brady* Is Consistent With The Nature And Meaning Of Due Process.

As we have already indicated, the provisions of the first eight amendments to the United States Constitution do not constitute specific limitations upon the power of the states. Provisions of these first eight amendments may, however, restrict the activity of a state in extreme instances, in which case the Fourteenth Amendment makes them applicable to a particular factual situation.

The Fourteenth Amendment is a broad, inexplicit provision, and it is not susceptible of being reduced to a mechanical or fixed formula. Speaking of the Fourteenth Amendment, in his concurring opinion in *Adamson v. California*, *supra*, at 66, Mr. Justice Frankfurter said:

> "The Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them."

As to the meaning of the due process clause of the Fourteenth Amendment, with respect to court procedure, that guaranty appears to require that no man shall be condemned without due notice and an opportunity of being heard in his defense. *Holden v. Mangum*, 237 U.S. 309; *Rogers v. Peck*, 199 U.S. 425; *Howard v. Kentucky*, 200 U.S. 164; *Garland v. Washington*, 232 U.S. 642; *Simon v. Craft*, 182 U.S. 427; *Missouri ex rel Hurwitz v. North*, 271 U.S. 40; and *Louisville and N.R. Co. v. Schmidt*, 177 U.S. 230.

In *Holden v. Hardy*, 169 U.S. 366, at 389, 390, due process was defined as follows:

"It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

In *Hebert v. Louisiana*, 272 U.S. 312, 316, this Court declared that the due process of law clause of the Fourteenth Amendment requires that state action "shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . ."

In *Snyder v. Massachusetts*, supra, at p. 114, Mr. Justice Cardozo referred to the "vague precepts" of the Fourteenth Amendment. He said in that case that:

"Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. 'The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall.' . . . What is fair in one set of circumstances may be an act of tyranny in others."[40]

Lisenba v. California, 314 U.S. 219, 236, contained the following rule for ascertaining what is meant by due process:

". . . as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally

40. 291 U.S. at 116, 117.

infected the trial, the acts complained of must be such quality as necessarily prevent a fair trial."

In Mr. Justice Frankfurter's concurring opinion in *Adamson v. California*, *supra*, at 67, 68, it was pointed out that judicial review of the due process clause of the Fourteenth Amendment "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples . . . . These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia . . . ."

Due process of law depends on circumstances. "It varies with the subject matter and the necessities of the situation." (Mr. Justice Holmes, in *Moyer v. Peabody*, 212 U.S. 78, 84). "The pattern of due process is picked out in the facts and circumstances of each case." *Brock v. North Carolina*, 344 U.S. 424; *Hoag v. New Jersey*, *supra*.

Other cases which discuss the necessity for an appraisal of the facts of each case in determining whether deprivation of counsel works a fundamental unfairness are *Gibbs v. Burke*, 337 U.S. 773, 780 and *Foster v. Illinois*, *supra*.

In *Palko v. Connecticut*, *supra*, at 325, this Court summarized the previous cases which had contained discussions on the meaning of due process and stated that immunities contained in the specific amendments may be included in the concept of due process if "found to be implicit in the concept of ordered liberty." Also, principles of justice "so rooted in the traditions

and conscience of our people as to be ranked as fundamental" may be considered a part of due process of the Fourteenth Amendment.

In *Palko* the opinion of this Court indicated that the right to counsel provision of the Sixth Amendment had been found to be implicit in the concept of ordered liberty, in *Powell v. Alabama*, supra. However, "the decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing."[41] The *Palko* case indicates that the right to counsel provision of the Sixth Amendment can be made applicable against the states through the Fourteenth Amendment only so far as the substance of a hearing would be thwarted by failure to provide counsel. What will be sufficient to constitute a fair hearing must naturally depend to some extent upon the circumstances of the particular case. *Gall v. Brady*, 39 F. Supp. 504.

It is now established that, in the administration of criminal justice, a state's duty to provide counsel is but one aspect of the comprehending guaranty of the due process clause of a fair hearing on an accusation, including adequate opportunity to meet it. *Quicksall v. Michigan*, supra; *Townsend v. Burke*, 334 U.S. 736; *Foster v. Illinois*, *supra*; *Carter v. Illinois*; and *Cicenia v. La Gay*, *supra*.

In other aspects of criminal procedure as well as in the right

41. 302 U.S. at 327.

to counsel area there is no "ready litmus-paper test" or fixed formula for determining what is due process. *U.S. v. Rabinowitz*, 339 U.S. 56; *Lynos v. Oklahoma*, 322 U.S. 596.

In conclusion, it may be said that due process cannot be reduced to a mechanical formula in cases relating to any area of criminal procedure. In right to counsel cases the appointment of counsel is an element of due process only to the extent that a fair and just hearing would be prevented by the failure to appoint counsel and to that extent only. Also, the right to counsel is just one aspect to be considered in determining, in a given case, whether there has been a denial of due process. While the federal courts are subject to strict, rigid, requirements of the first eight amendments, the states are restricted only by the broad definitions of due process set forth in *Holden v. Hardy*, *Hebert v. Louisiana*, and *Palko v. Connecticut*. The "fair trial" test set out in *Powell v. Alabama* and *Betts v. Brady* is a natural and imperative result of the principles which have been developed by this Court in *Palko* and similar cases. In applying the "fair trial" test we must look to the circumstances of each case.

D. The *Betts v. Brady* Rule, As Developed By This Court, Provides a Clear And Consistent Standard For Determination Of The Right To Counsel Under The Fourteenth Amendment.

From the cases that have been decided under the *Betts v. Brady* rule during the last twenty years, this Court has proclaimed the following factors or circumstances as guides for determining whether a defendant, in a particular situation, has been denied the aid of court-appointed counsel:

1. Gravity of the offense, i.e., whether capital or non-capital.[42]
2. Complexity of the charge against the defendant.[43]
3. Ignorance[44]
4. Illiteracy or lack of education[45]
5. Extreme youth or lack of experience[46]
6. Familiarity with court procedure[47]
7. Feeble-mindedness or insanity[48]
8. Inability to understand the English language[49]
9. Prejudicial conduct shown by trial judge, prosecuting attorney or public defender[50]
10. Plea of guilty by co-defendant within hearing of jury[51]

To illustrate his position that the *Betts* rule does not provide a workable standard, counsel for Petitioner has, on pages 37 and 38 of his brief, compared three sets of cases. None of the comparisons, however, prove his thesis. For instance, he points out that this Court reversed the conviction of a seventeen year old

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42. *Williams v. Kaiser*, 323 U.S. 471; *Tomkins v. Missouri*, 323 U.S. 485; *Hamilton v. Alabama*, 368 U.S. 52.
43. *Rice v. Olson*, 324 U.S. 786; *DeMeerleer v. Michigan*, 329 U.S. 663; *McNeal v. Culver*, 365 U.S. 109; *Chewning v. Cunningham*, 368 U.S. 443; *Pennsylvania ex rel Herman v. Claudy*, 350 U.S. 116.
44. *Smith v. O'Grady*, 312 U.S. 329; *Tomkins v. Missouri*, *supra* note 42.
45. *Carnley v. Cochran*, 369 U.S. 506; *Cash v. Culver*, 358 U.S. 633.
46. *Wade v. Mayo*, 334 U.S. 672; *Uveges v. Pennsylvania*, 335 U.S. 437; *Moore v. Michigan*, 355 U.S. 155.
47. *Wade v. Mayo*, supra note 46; *McNeal v. Culver*, *supra* note 43.
48. *Palmer v. Ashe*, 342 U.S. 134; *Massey v. Moore*, 348 U.S. 105.
49. *Marino v. Ragen*, 332 U.S. 561.
50. *White v. Ragen*, 324 U.S. 760; *Townsend v. Burke*, 334 U.S. 736; *Hawk v. Olson*, 326 U.S. 271; *Reynolds v. Cochran*, 365 U.S. 525; *Gibbs v. Burke*, 337 U.S. 773.
51. *Hudson v. North Carolina*, 363 U.S. 697.

youth, in *DeMeerleer v. Michigan*, 329 U.S. 663, while upholding the conviction of a sixteen year old defendant in *Gayes v. New York*, 332 U.S. 145. DeMeerleer was confronted by a complex first-degree murder charge and was arraigned, tried, convicted and sentenced on the same day. The record showed that he had never been advised of his right to counsel, and indicated that considerable confusion existed in his mind at the time of arraignment as to the effect of a plea of guilty. No evidence was introduced on his behalf, and no witnesses were cross examined. Gayes, at the age of sixteen, was charged with burglary in the third degree and petit larceny. He said he didn't want counsel and pleaded guilty. At the age of 19 he pleaded guilty to a charge of being a second offender. After having served the first sentence, he sought relief from the second offender sentence, but this Court pointed out that he could not "by a flank attack"[52] challenge the first sentence.

In his second comparison, Petitioner has attempted to find inconsistency between *Quicksall v. Michigan*, 339 U.S. 660, and *Carnley v. Cochran*, 369 U.S. 506. He states that in *Quicksall* "the Court felt it reasonable to presume from the accused's prior appearances in court that he knew of his right to counsel, and since he made no request for legal aid, his rights were not infringed," but that in *Carnley* "the Court felt that a prior criminal record magnified the importance of the assistance of counsel because of its implications in the event the accused takes the witness stand."[53] In *Quicksall* the defendant pleaded guilty and, of course, there was no danger of his taking the witness stand. It should also be noted that, prior to the time

52. 332 U.S. at 149.
53. *Supra* note 20 at 37 and 38.

that the *Quicksall* case reached this Court, the Michigan courts had meticulously made findings of fact which conclusively showed that the Petitioner's plea of guilty was freely, voluntarily and understandingly made.

Petitioner states that it is difficult to reconcile *Gryger v. Burke*, 334 U.S. 728, with *Townsend v. Burke*, 334 U.S. 736, saying that in *Gryger* the defendant "argued that the state court mistakenly assumed that the applicable statute made (his sentence) mandatory", while in *Townsend*, "the defendant contended that the court imposed a sentence under the erroneous impression that defendant's record included convictions on two charges as to which, in fact, he had been acquitted."[54] (parenthesis ours). A reading of the *Townsend* case makes clear that the reversal of petitioner's sentence there was due to the foul play, carelessness, and facetiousness on the part of the trial court. This Court's ruling in *Gryger* was due to the fact that petitioner's allegation involved a question of Pennsylvania law which this Court was not empowered to decide. Also, there was nothing in the record to impeach "the fairness and temperateness with which the trial judge approached his task."[55]

If it can be said that *Betts* and the cases which have followed are inconsistent and that they do not comprise a workable standard, it can be argued with equal force that the entire common law is inconsistent and that it, likewise, should be rejected. The *Betts* approach is the common law approach, consisting of the development of a body of law on a case by case basis, and lawyers for centuries have thrived on distin-

54. *Id.* at 38.
55. 334 U.S. at 731.

gushing one case from another on the basis of factual situations and circumstances.

Petitioner argues that the distinction existing in the *Powell v. Alabama—Betts v. Brady* rule between capital and non-capital offenses does not furnish a valid basis for deciding when to appoint counsel and cites the case of *Kinsella v. United States*, 361 U.S. 234, among others, as authority. There it was held by this Court that the Armed Forces have no *power or jurisdiction* to try dependents accompanying servicemen overseas during peacetime for non-capital offenses. It was shown that military jurisdiction was based upon status rather than the nature of the offense. Since the Court had already ruled that military tribunals had no jurisdiction in capital cases, under similar circumstances, *Reid v. Covert*, 354 U.S. 1, it followed that no jurisdiction existed, irrespective of the gravity of the crime involved.

In objecting to the "distinction" between capital and non-capital crimes in the right to counsel cases, Petitioner makes the mistake of confusing the rule with its application. *Powell v. Alabama* did not require automatic appointment in all capital cases. It was meticulously limited to its own facts. *Betts v. Brady* was merely an extension of the *Powell* rule to cases less than capital. Under the rule of these two cases, a defendant, to show a denial of counsel, was required to establish circumstances which operated to deny him a fair trial. In the application of the rule, the fact that a charge is capital has become one of the factors in determining whether a petitioner should have been given counsel. Automatic assignment in death cases has now become an almost inflexible requirement, under the *Powell-Betts* rule, not because capital cases are necessarily more complex, but

because (1) all capital crime states have statutes requiring appointment in such cases and (2) courts have recognized the finality of the death penalty and the procedural distinction which many states make between capital and non-capital crimes. Some legislatures have placed the death penalty in the hands of the jury rather than the judge. Indictment by grand jury is provided in capital but not in non-capital cases, in many instances. Some state laws require that capital cases be tried before a larger petit jury than is provided for non-capital cases. When a man is faced with a non-capital charge there is always the chance that he may obtain probation or, eventually, parole. These and many more distinctions between the two categories of offenses support the tendency of the courts to require automatic appointment in all death cases, but not in cases less than capital.

Respondent submits that *Betts* and the cases which have followed provide a clear, consistent and operable standard for the states to follow in applying the due process clause of the Fourteenth Amendment in right to counsel cases.

E. Although States Now Provide For Appointment In Many Instances, The Rights So Provided Have Not Generally Been Accepted As Being Fundamental Or Constitutional In Character.

An examination of the constitutions, statutes, and court rules which have been adopted by the various states and the cases which have construed these provisions will reflect that, although all states have made provision for appointment in some instances, there is no general concensus that a right to automatic appointment in all cases, or even in all felony cases, is of a fundamental

or constitutional character. Some states have required appointment for indigents in capital cases. Some have provided automatic free counsel in felonies, and a very few have extended the right to misdemeanors. The means by which counsel is provided vary from state to state. Some make such provision by court rule and others by statute. Some state courts have construed the right to appointment as having no constitutional basis, while stating that their constitutions only guarantee the right to employ counsel. Others have held that the right to automatic appointment for indigents is of a constitutional nature. There is, thus, no general or consistent feeling among the states as to the nature and scope of the right to appointed counsel. For a short summary of the laws, rules and cases of the various states on this subject, see Appendix B, *infra*.

F The Sixth Amendment, As Construed In *Johnson v. Zerbst*, Should Not Be Made Applicable Against The States Through The Due Process Clause Of The Fourteenth Amendment.

The Sixth Amendment provides that "in *all criminal prosecutions*, the accused shall enjoy the right . . . to have the assistance of counsel for his defense" (emphasis supplied). The underlined words contemplate misdemeanor as well as felony cases. Consequently, if the counsel provision of the Sixth Amendment should be made applicable as against the states, counsel would be automatically required in all cases regardless of their triviality. As Mr. Justice Roberts said in *Betts v. Brady*, *supra*, at 473:

> "To deduce from the due process clause a rule binding upon the states in this matter would be to impose upon

them, as Judge Bond points out, a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction. As he says: 'Charges of small crimes tried before justices of the peace and capital charges tried in the higher courts would equally require the appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it.'

Petitioner urges the court to abolish any distinction in the *Betts* rule between capital and non-capital cases. If there can be no distinction between capital cases and non-capital felonies, by the same token there can be no differentiation between felonies and misdemeanors.

If the requirements of the Sixth Amendment as presently construed should be extended to minor cases, this requirement would impose an enormous burden on members of the Bar who might be called upon to defend such charges. Also, such an imposition would encourage those charged with misdemeanors to plead not guilty and, consequently, more time would be consumed in the trial of minor cases. The entire undertaking would result in unnecessary expense to tax payers.

Mr. Justice Roberts also commented in *Betts v. Brady*, at p. 473, as follows:

"... indeed it was said by petitioner's counsel both below and in this court, that as the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, if we hold with the petitioner logic would require the furnishing of counsel in civil cases involving property."

The Fourteenth Amendment prohibits states from depriving persons of life, liberty, or property without due process of law. If this Court imposes a rigid requirement regarding the automatic appointment of counsel instead of following the present case by case method of review, the new requirement could not be limited only to criminal felony cases, nor could it be limited to crimes. Since the due process clause places life, liberty, and property on an equal plane, an inflexible counsel appointment rule promulgated by this Court would logically have to apply in civil cases as well as criminal causes. The rule would apply in federal as well as in state courts, as the due process clause of the Fifth Amendment would, presumably, make the new rule applicable against the federal government as well as against the states. Further, in civil cases, counsel would have to be appointed for indigent plaintiffs as well as defendants, since it may be necessary for them to initiate proceedings, in some cases, to prevent deprivation of property of liberty without due process of law.

To reject the *Betts* rule is to impute to judges a lack of ability and integrity which we should not accept as a major premise. As this Court said in *Gibbs v. Burke*, 337 U.S. 773, 780:

> ". . . the fair conduct of a trial depends largely on the wisdom and understanding of the trial judge. He knows the essentials of a fair trial. The primary duty falls on him to determine the accused's need of counsel at arraignment and during trial. He may guide a defendant without a lawyer past the errors that make trials unfair . . . ."

Let us assume the case in which the trial judge protects every right of the accused, by insuring that the defendant has ample opportunity to procure his witnesses and prepare his defense

and by interposing motions at the trial on the defendant's behalf, if he fails to do so, to prevent any waiver of procedural or evidentiary rights. Or let us suppose the case where a wise and fair judge accepts a plea of guilty only after carefully explaining all his rights to the accused. In such case, where the court obviously provides a fair hearing for the defendant, who can say that the *Palko*, *Hebert* or *Holden v. Hardy* tests of due process have not been fully met?

A fallacy in some arguments is the premise that every defendant who enters a criminal court is entirely unqualified to handle his own defense. This premise evades the inescapable fact that some defendants are more competent in the field of criminal law than are some lawyers. Some lawyers never practice criminal law; many do no courtroom work. If *Betts* should be overruled, lawyers in those areas that are forced to resort to the appointment system will in some cases be less familiar with the criminal courtroom and its procedures than some of the indigents they defend.

In the event that automatic appointment of counsel would be required in all state courts, some states or areas in those states will be forced into using an appointment system of some type. Reginald Heber Smith, in the book, *Justice and the Poor*, p. 114, said:

> "The assignment of counsel in criminal cases, except when the offense charged is murder, has been a general failure . . . . As a system, both in plan operation, it deserves unqualified condemnation."

Smith reasoned that appointed counsel in murder cases work harder because the case generally receives newspaper publicity

and because of the realization that they have a man's life in their hands. Very frequently the circumstances of a non-capital charge may be revolting, and the prisoner charged with such crime may arouse no sympathy in the community. Smith also pointed out that the average lawyer cannot afford to give a thorough defense. He cannot afford to pay for investigators and other experts out of his own pocket, which he would, of necessity, be required to do in those states whose legislatures fail to provide for reimbursement.

"Incorporation" of the Sixth Amendment counsel provision, as presently construed, into the due process clause of the Fourteenth Amendment would not solve the problem of persons who are able to pay a lawyer a small amount, but who are unable to purchase *adequate* representation. Poor persons who get into a hospital sometimes get better treatment than the person of moderate means. That might happen in some cases in the courts.[56]

It has been argued that an inflexible counsel appointment requirement, if imposed on the states, will halt the flood of litigation concerning the right to counsel. This, however, is an unrealistic assumption. To begin with, reversal of *Betts v. Brady* would create myriad and complex new legal questions regarding the right to counsel in misdemeanor and civil cases, as well as questions concerning the significance of our federal system. Also, an examination of recent cases under Criminal Law, key number 641, and Constitutional Law, key number 268, in West Publishing Company's Decennial Digest System, will reflect

56. See Kadish and Kimball, "Legal Representation of the Indigent in Utah," 4 Utah L. Rev. No. 1, p. 198.

that an increasing trend in right to counsel cases is for prisoners to attack their sentences on the grounds of *inadequate* representation. This problem of ineffective representation will exist regardless whether we follow *Betts* or a new rule.

This Court's decision in *Mapp v. Ohio*, 367 U.S. 643, does not furnish, by analogy, any basis for making the counsel provision of the Sixth Amendment applicable against the states. In *Boyd v. United States*, 116 U.S. 616, this Court said that the search and seizure provision of the Fourth Amendment took its origin in the safeguards which had grown up in England. That right has firm basis in the common law. In *Elkins v. United States*, 364 U.S. 206, 217, Mr. Justice Stewart said, speaking of the exclusionary rule:

> "Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it."

Adoption of the exclusionary rule in *Mapp* was necessary in order to prevent the right to be free from illegal searches and seizures, a right having a firm foundation in the common law, from being a hollow, meaningless, and ineffective guaranty. The Sixth Amendment counsel provision as now construed has no such firm historical basis.

The Sixth Amendment, as construed in *Johnson v. Zerbst*, should not be made applicable to the states through the due process provision of the Fourteenth Amendment.

G. Automatic Appointment Of Counsel For Defendants In All Criminal Cases Should Not Be Required Under The Equal Protection Clause Of The Fourteenth Amendment.

In *Griffin v. Illinois*, 351 U.S. 12, this Court held that a state may not deny appellate review solely because of poverty. There, by a statute, Illinois had made it virtually impossible for an indigent to obtain a review of his conviction. In effect, the state had blocked indigents from entering the appellate courts just as effectively as if it had required a prohibitive filing fee. The *Griffin* case constitutes a reaffirmation of the doctrine announced in *Barbier v. Connolly*, 113 U.S. 27, 31, to the effect that all persons "should have like access to the courts of the Country for the protection of their persons and property."

To comply with the *Griffin* case, a state must not close the courtroom door to anyone on account of his poverty. However, the *Griffin* case does not require that states take affirmative action to equalize economic conditions existing between its citizens and over which it has no control. Mr. Justice Black said, in the majority opinion, at page 20:

> "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases. The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice. We are confident the State will provide corrective rules to meet the problem which this case lays bare."

As the above quoted portion of the majority opinion indicates, states need not provide indigents with the exact same advantages which are available to those who have the purchasing power of money.

If automatic appointment of counsel in all cases should be required by this Court under the equal protection clause of the Fourteenth Amendment, such requirement would open a veritable "Pandora's Box", which would cause an enormous volume of litigation and which would cause repercussions in all fields of law. For instance, if a state can be required to provide counsel in every criminal trial, under that clause, it can just as logically be argued that a state should provide counsel in appeals and in post-conviction proceedings. Also, under such a construction of the Fourteenth Amendment, states would logically be required to provide an indigent with bail, with the services of investigators, psychiatrists, etc., in criminal proceedings, since those things are available to the rich man. In civil proceedings and in many other areas of life, a construction of the Fourteenth Amendment, similar to that given the Sixth Amendment, would create many difficulties and problems which were never dreamed of by the framers of the equal protection clause.

H. The Practical Implications Involved In This Case Require Adherence To The Doctrine Of *Betts v. Brady*.

To overrule *Betts v. Brady* would be to create multifold new problems in the fields of criminal and constitutional law. As already indicated, the imposition of an inflexible rule that the states appoint counsel in all cases would raise questions which would cause a flood of litigation in federal and state tribunals. The *Mapp* case, *supra*, which involved an appeal from the state court, has been held to be essentially prospective in operation. There can be no doubt that it is the duty of state courts to follow the *Mapp* holding in all trials taking place after June 19, 1961. (The date of that decision). *People v. Loria*, (N.Y.),

179 N.E. 2d 478. As to cases arising prior to *Mapp*, in *United States v. Fay*, 199 F. Supp. 415, it was pointed out that state courts should be afforded the initial opportunity to evaluate any possible retroactive effect that the *Mapp* decision may have on their criminal procedures.

In *State v. Evans*, (N.J.), 183 A. 2d 137, the court held that although application of the decision in the *Mapp* case is essentially prospective, it is not necessarily inapplicable merely because an illegal search antedated the decision; however, its retrospective effect is circumscribed by potential limits and is subordinate to essential justice both to the individual and to the community. Collateral attack, or the equivalent, on pre-*Mapp* convictions has been denied in *State v. Long*, (N.J.), 177 A. 2d 609; *People v. Muller*, (N.Y.), 182 N.E. 2d 99; *People v. Figueroa*, 220 N.Y.S. 2d 131; *People v. Oree*, 220 N.Y.S. 2d 121; and *Hall v. Warden*, 201 F. Supp. 639. Regarding the effect of *Mapp*, see also *United States v. La Vallee*, 206 F. Supp. 679; and *United States ex rel Gregory v. People of New York*, 195 F. Supp. 527.

In sum, it makes a great deal of difference whether a case comes to this Court after an appeal or from a collateral proceeding in the state courts. A decision by this Court reversing a state court appeal is essentially prospective in operation, while the contrary is true with respect to reviews of collateral proceedings. If the instant case involved an appeal instead of a collateral attack upon his sentence by petitioner, a reversal overruling *Betts v. Brady* would allow the state courts some flexibility in determining whether and in what circumstances such a decision should apply retroactively.

However, since Gideon attacked his sentence by way of habeas corpus, a decision reversing the ruling of the court below would necessarily be retroactive in effect. (In *Eskridge v. Washington Prison Bd.*, 357 U.S. 214, this Court's holding in *Griffin v. Illinois*, which involved a post conviction proceeding, was applied retrospectively.)

After certiorari was granted in this case, a survey of all its prisoner files or records was made by the Division of Corrections of the State of Florida, to determine the number of prisoners incarcerated who had not been represented by counsel in the proceedings which resulted in their convictions. That survey resulted in these findings:

1. As of June 30, 1962, the Division of Corrections had in custody 8,000 prisoners.
2. Of this group, 4,065 entered pleas of guilty with no counsel.
3. Of this group, 1,504 entered pleas of guilty and were represented by counsel when they entered their pleas.
4. 477 of this group entered pleas of not guilty and were not represented by counsel.
5. 975 entered pleas of not guilty and were represented by counsel.
6. As to the remaining 979, the records were either so old that the information needed was not contained in them, or for some other reason the Division was unable to ascertain whether those prisoners were represented by counsel.

The above figures reflect that approximately 65% of those whose records were available were not represented by counsel in the proceedings resulting in their convictions. If this percentage is true, it appears that, as of June 30, 1962, the Division

had in custody approximately 5,200 prisoners who had not been represented by counsel in the trial court. On November 30, 1962, the Division had 7,836 prisoners in custody. Again, applying the 65% figure, approximately 5,093 unrepresented prisoners were in custody as of that date.

If *Betts* should be overruled by this Court in the instant case, as many as 5,093 hardened criminals may be eligible to be released in one mass exodus in Florida alone, not to mention those in other states where automatic appointment of counsel in non-capital cases was not provided for at one time or another. Of course, some of them may be re-tried, but it is often impossible to re-try a man due to practical difficulties in locating witnesses, marshalling evidence, etc. If the instant case should be reversed and the new rule made retroactive, many of these 5,093 criminals will go free, without the possibility of a retrial. Florida and other states have, for the past twenty years, followed this Court's decisions in the right to counsel area in good faith. In view of this good faith reliance on the *Betts* rule by Florida and other states, and in recognition of the danger to society in the event that the prison doors of the land are opened by such a decision, it is urged that the doctrine of *Betts v. Brady* be adhered to.

If this Court should decide to overrule *Betts*, Respondent respectfully requests that it be accomplished in such way as to prevent the new rule from operating retrospectively. (See concurring opinion of Mr. Justice Frankfurter in *Griffin v. Illinois, supra; Great Northern R. Co. v. Sunburst Oil Co.*, 287 U.S. 358; *Warring v. Colpoys*, 122 F. 2d 642, 136 A.L.R., 1025; *State v. Smith*, (*N.J.*), 181 A. 2d 176).

CONCLUSION

For the reasons stated, the doctrine of *Betts v. Brady* should be adhered to, and the judgment of the Court below should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Richard W. Ervin, Attorney General of Florida, certify that on the day of December, 1962, I served copies of the foregoing Brief for Respondent upon Petitioner by mailing the same by air mail with postage prepaid to Petitioner's counsel, the Honorable Abe Fortas, 1229 19th Street, Washington 6, D.C.

Richard W. Ervin
Attorney General of Florida

APPENDIX A

Constitutional and Statutory Provisions Involved

Amendment VI, U. S. Const.:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section 79.01, Florida Statutes:

"Whenever any person detained in custody, whether charged with a criminal offense or not, shall, by himself or by some other person in his behalf, apply to the supreme court of the state or to any justice thereof, or to any circuit judge, in vacation or in term time, for a writ of habeas corpus, and shall show by affidavit or evidence probable cause to believe that he is detained in custody without lawful authority, the court, the justice or judge to whom such application shall be made forthwith shall grant the writ, signed by himself, directed to the person in whose custody the applicant is detained, and returnable immediately before such court, justice or judge, or any of said courts, justices or judges, as the writ issued may direct."

Chapter 61-639, Laws of Florida, 1961:

"AN ACT providing for the appointment of a public defender by the Board of County Commissioners in all of the

Counties of Florida having a population of not less than three hundred ninety thousand (390,000) and not more than four hundred fifty thousand (450,000) according to the latest official state-wide decennial census, providing for the qualifications, duties and compensation of said public defender, providing for the appointment of assistant public defenders, investigators and clerical assistance, providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. The Board of County Commissioners in all counties of Florida having a population of not less than three hundred and ninety thousand (390,000) and not more than four hundred and fifty thousand (450,000), according to the latest official state-wide decennial census, shall appoint and employ a public defender to serve at the pleasure of the Board of County Commissioners. Such public defender shall be a licensed practicing attorney of the state of Florida and shall receive compensation as fixed by the Board of County Commissioners, but such compensation shall be not less than seven thousand five hundred dollars ($7,500.00) per year.

Section 2. The public defender shall give priority and preference to his duties under the provisions of this act and may engage in the private practice of law only to the extent that it will not interfere or prevent the performance of his duties as public defender of any such county, and shall not engage in the private practice of criminal or quasi-criminal law. The public defender shall, where justice requires, represent, without charge, any indigent person who is charged with a crime which may be tried in the criminal court of record of said county and shall represent said indigent person at all stages of the proceedings, including the preliminary examination or hearing

although the same may be in a court other than the criminal court of record. The public defender shall prosecute any appeals or other remedies before or after conviction that he considers to be in the interest of justice. Nothing herein shall be construed as interfering with the inherent right of the court to appoint counsel in proper cases.

Section 3. The public defender shall be authorized to employ at least one assistant public defender who shall also be a practicing attorney of the state of Florida, and in addition thereto at least one investigator. The public defender may employ additional assistant public defenders and additional investigators with the consent of the Board of County Commissioners. The public defender may also hire secretaries and other clerical help. The salaries and fees of said assistant public defenders, investigators, and secretaries shall be fixed by the Board of County Commissioners.

Section 4. The selection of said public defender shall be made by the Board of County Commissioners with the advice of the circuit judges and judges of the criminal court of record of said counties.

Section 5. All payments of money herein provided to be made are declared to be payments for county purposes of any such county, being payable out of the funds of said county, and any and all facilities to be required to be furnished hereunder, if any, are likewise declared to be for the county purpose of said county.

Section 6. All laws and parts of law in conflict herewith are hereby repealed.

Section 7. If any part or parts of this act shall be held unconstitutional such holdings shall not affect the validity of the remaining parts of this act.

Section 8. This act shall take effect on October 1, 1961.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 22, 1961."

APPENDIX B

Constitutions

All states except Virginia have specific constitutional provisions regarding the right to counsel. They provide substantially as follows:

In all criminal prosecutions the accused shall have the right to appear and defend in person and by (with) counsel.

Arizona	II.	24.
Colorado	II.	16.
Idaho	I.	13.
Illinois	II.	9.
Missouri	I.	18.
Montana	III.	16.
North Dakota	I.	13.
Utah	I.	12.

In all criminal prosecutions the accused shall have (enjoy) the right to the assistance of counsel for (or in) his defense.

Alaska	I.	11.
Hawaii	I.	11.
Michigan	II.	19.
Minnesota	I.	6.
New Jersey	I.	10.

In all criminal prosecutions the accused shall have (enjoy) the right to be heard by himself and his counsel.

Arkansas	II.	10.
Delaware	I.	7.
Pennsylvania	I.	9.
Tennessee	I.	9.
Vermont	I.	10.

In all criminal prosecutions the accused has (shall have) the right to be heard by himself and counsel.

Indiana	I.	13.
Kentucky	II	
Oklahoma	II.	20.
Oregon	II.	11.
Wisconsin	I.	7.

In all criminal prosecutions the accused shall be heard by himself, or counsel, or both.

Florida	D.R.	11.
Mississippi	III.	26.
Texas	I.	10.

In all criminal prosecutions the accused shall have the right to defend in person and by counsel.

South Dakota	VI.	7.
Wyoming	I.	10.

(In any trial) in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions.

Nevada	I.	8.
New York	I.	6.

In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel.

Nebraska	I.	11.
Washington	I.	22.

In all criminal prosecutions, the accused has the right to be heard by himself and counsel or either.

Alabama	I.	6.

In all criminal prosecutions, in any court whatever, the party accused shall have the right to appear in person and with counsel.

California I. 13.

In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel.

Connecticut I. 9.

Every person charged with an offense shall have the privilege and benefit of counsel.

Georgia I. 1.5.

In all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right to have the assistance of counsel.

Iowa I. 10.

In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel.

Kansas B.R. 10.

In all criminal prosecutions the accused shall have the right to defend himself, (and) have the assistance of counsel.

Louisiana I. 9.

In all criminal prosecutions, the accused shall have a right to be heard by himself and his counsel, or either, at his election.

Maine I. 6.

In all criminal prosecutions every man hath a right to be allowed counsel.

Maryland D.R. 21.

Every subject shall have a right to be fully heard in his defense by himself or his counsel at his election.

Massachusetts D.R. 12.

Every subject shall have a right to be fully heard in his defense by himself and counsel.

New Hampshire I. 15.

In all criminal prosecutions the accused shall have the right to appear and defend himself in person and by counsel.

New Mexico II. 14.

In all criminal prosecutions every person charged with crimes has the right to have counsel for defense.

North Carolina I. 11.

In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel.

Ohio I. 10.

In all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel in his defense, and shall be at liberty to speak for himself.

Rhode Island I. 10.

In all criminal prosecutions the accused shall enjoy the right to be fully heard in his defense by himself or his counsel or by both.

South Carolina I. 18.

In trials of crimes and misdemeanors the accused shall have the assistance of counsel.

West Virginia III. 14.

Statutes and Court Rules

I. States Which Do Not Make Provision For Automatic Appointment of Counsel In All Non-Capital Felony Cases

A. Statutes

Alabama	Tit. 15, §318
Florida	Fla. Stat. 909.21 (It should be noted that Florida has provided public defender systems in some of its larger counties, for non-capital cases. See Chapter 61-639, Laws of Florida, 1961, Appendix A, which created the Hillsborough County system.)
Hawaii	Rev. Laws of Hawaii, §253-5 (In felony cases in a circuit court, trial judge "may" assign counsel.)
Maine	Me. Rev. Stat., c., 148, §11 (Counsel "may" be assigned by the superior court in any criminal cases, and shall be assigned in all cases punishable by imprisonment for life.)
Mississippi	Miss. Code Ann. §2505

New Hampshire	N.H. Rev. Stat. §§604:1, 604:2. (Appointment may be made for persons held for the grand jury charged with an offense, the punishment whereof may be three years imprisonment, if the court is of the opinion that injustice may be done if appointment is not made.)
North Carolina	N.C. Gen. Stat. §15-4.1
Pennsylvania	Purdon's Pa. Stat., Tit. 19, §§783, 784.
South Carolina	S.C. Code of Laws, §17-507.
Vermont	13 Vt. Stat. Ann. §6503

B. Court Rules:

Delaware	Superior Court Rules—Rule 44 (Gives court discretion in non-capital cases)
Maryland	Md. Rules of Procedure, Criminal Causes, Rule 723, b. (in all capital cases and other "serious cases").

II. States Which Make Some Provision For Appointment In All Non-Capital Felony Cases

A. Statutes providing for appointment in cases arising in certain courts:

Connecticut	Gen. Stat. of Conn. §54-80 (superior court of common pleas)
Idaho	Idaho Code Ann. §§19-1512, 19-1513 (district court)

Oregon	Ore. Rev. Stat. §135.320 (circuit court)
Rhode Island	Title 12, Chapt. 15, Gen. Laws of R.I. (superior court)
South Dakota	S.D. Code 34.1901 (circuit, municipal or county court)

B. Statutes providing for appointment at arraignment without specifically limiting such appointment to any category of offenses:

California	Calif. Penal Code §987
Iowa	Iowa Code Ann. §775.4 (This statute evidently does not apply in minor cases, which are tried summarily. See Art. I, §11, Const. of Iowa)
Kansas	Gen. Stat. of Kansas, §62-1304
Montana	Rev. Code of Montana, §94-6512
Nevada	Nev. Rev. Stat. §174.120
New York	N.Y. Code of Crim. Pro. §308
Oklahoma	22 Okla. Stat. §464
South Dakota	S.D. Code §34.3506
Utah	Utah Code Ann. §77-22-12 (Right appears to apply in misdemeanors, but as a practical matter, very few misdemeanor defendants are arraigned and the right in those cases is very limited. Kadish and Kimball, "Legal Representation of the Indigent in Criminal Cases in Utah", 4 Utah L. Rev. pp. 202, 203.)

C. Statutes which appear to provide for appointment of counsel only in felony cases:

Arkansas	Ark. Stat. §43-1203
Illinois	Ill. Rev. Stat. c. 110, §101.26 (2)
Louisiana	La. Rev. Stat. §15-143
Missouri	Mo. Rev. Stat. §545.820
Nebraska	Rev. Stat. of Neb. §29-1803
New Mexico	N.M. Stat. Ann. §41-11-2
Ohio	Ohio Rev. Code §2941.50
Texas	Vernon's Texas Code of Crim. Pro., §494
Virginia	Code of Va., §19.1 - 241
Washington	Rev. Code of Wash., §10.01.110
Wisconsin	Wis. Stat. Ann. §957.26

D. Statutes which, according to their wording, may or do require appointment in some misdemeanor cases:

Kentucky	Ky. Rev. Stats. §455.010
Minnesota	Minn. Stat. §611.07 (felonies or gross misdemeanors)
North Dakota	N.D. Century Code §§29-01-27, 29-13-03.
Tennessee	Tenn. Code §§40-2002, 40-2003.
Wyoming	Wyo. Stat. §7-7

E. The following states provide for appointment by court rule:

Alaska	Rules of Crim. Pro., Rule 39 (b) (Rules govern procedure in superior court in all criminal proceedings and, insofar as they are applicable, in other courts, see Rule 1.)
Arizona	Rules of Crim. Pro., Rule 163 (felonies)
Colorado	Colo. R. Crim. Pro., Rule 44 (felonies)
Illinois	Ill. Supreme Court Rules, Rule 26 (2)
Massachusetts	Rule 10, General Rules of the Supreme Judicial (felonies; also provides for discretionary assignment in lesser cases.)
Michigan	Mich. Ct. R. 35A. (felonies) (See *People v. Bumpus*, 94 N.W. 2d 854)
Missouri	Rule 29.01, Supreme Court Rules (felonies)
New Jersey	Rev. Rules, §1-12-9
West Virginia	Rules of Practice for Trial Courts, Rule IV.

CASES

1. Decisions in the following states reflect that the right to have counsel appointed in all non-capital cases is not of constitutional or fundamental character.

Alabama	Cook v. State, 22 So. 2d 924

Colorado	Kelley v. People, 206 P. 2d 337
Florida	Sneed v. Mayo, 66 So. 2d 865
Illinois	People v. Bute, 72 N.E. 2d 813; People v. Evans, 74 N.E. 2d 708
Iowa	Carpentier v. Lainson, 84 N.W. 2d 32
Maryland	Marvin v. Warden, 129 A. 2d 85; Coates v. State, 25 A. 2d 676
Massachusetts	Dugliese v. Commonwealth, 140 N.E. 2d 476; Commonwealth v. Blondin, 87 N.E. 2d 455; Allen v. Commonwealth, 87 N.E. 2d 192
Michigan	People v. Haddad, 11 N.W. 2d 240; People v. Williams, 195 N.W. 1044
Minnesota	State v. Rigg, 93 N.W. 2d 198; State v. Martin, 27 N.W. 2d 158
Mississippi	Reed v. State, 109 So. 715
Missouri	Edwards v. Nash, 303 S.W. 2d 11
N. Carolina	State v. Hedgebeth, 45 S.E. 2d 563
N. Dakota	Mazakahonni v. State, 25 N.W. 2d 772
Oregon	People v. Delaney, 332 P. 2d 71
Pennsylvania	Commonwealth v. Bannmiller, 171 A. 2d 603; Commonwealth ex rel McGlen v. Smith, 24 A. 2d 1
S. Carolina	State v. Hollman, 102 S.E. 2d 873

S. Dakota	State v. Jameson, 104 N.W. 2d 45, State v. Sweeney, 203 N.E. 460
Texas	Stanfield v. State, 212 S.W. 2d 816, Ex P Johnson, 318 S.W. 2d 66
Vermont	State v. Gomez, 96 A. 490
West Virginia	State v. Yoes, 68 S.E. 181
Wisconsin	State v. Turpin, 38 N.E. 2d 475

II. The following decisions reflect that the right to counsel in capital cases is fundamental.

Arkansas	Thurman v. State, 168 S.W. 2d 833
California	People v. Mattson, 336 P. 2d 937
Georgia	Walker v. State, 22 S.E. 2d 462
Indiana	State v. Allen Circuit Court, 153 N.E. 2d 914
Kansas	Kansas v. Hudspeth, 178 P. 2d 246
Kentucky	Powell v. Commonwealth, 346 S.W. 2d 731
New Jersey	State v. Johnson, 163A. 2d 593
New Mexico	State v. Garcia, 142 P. 2d 552
New York	People v. Waterman, 155 N.E. 2d 445
Ohio	In re Matz, 136 N.E. 2d 430
Oklahoma	Hunter v. State, 288 P. 2d 425

III. The following cases have held that there is no right to appointment of counsel in all misdemeanors

Arkansas	Kirkwood v. State, 136 S.W. 2d 175
Minnesota	State v. Martin, 27 N.W. 2d 158
Nebraska	Kissinger v. State, 25 N.W. 2d 829

CONCLUSION

The above indicates that it has been the considered judgment of the people of the states that appointment of counsel in all felony cases, or in all criminal cases, is not a fundamental right. The matter has generally been deemed one of ligislative or a court rule making policy.